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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 536

In the Matter
of
FLORIDA EAST COAST RAILWAY COMPANY,
Debtor,

ST. JOE PAPER COMPANY, a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, J. BRYSON AIRD and BANK OF THE MANHATTAN COMPANY as Successor Mortgage Trustees, RAILWAY LABOR EXECUTIVES' ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, and SOUTHERN RAILWAY SYSTEM AND AFFILIATED LINES (being the companies listed inside of cover),
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

Opinions Below

The opinion of the District Court (R. Vol. VII, p. 127) has not been reported. A copy is appended as Appendix I.

The opinion of the Court of Appeals (R. Vol. VII, p. 380) has not been reported. A copy is appended as Appendix II.

Jurisdiction

The judgment of the Court of Appeals was entered November 5, 1954.

Jurisdiction to issue the writ rests on Title 28, United States Code §1254.

Questions Presented

I. The questions presented cannot be framed adequately without reference to this Court's prior opinion.* It was there decided that a plan of reorganization calling for the Debtor's merger with the Atlantic Coast Line had a congenital defect, beyond remedy, because not initiated as a voluntary proposal by the two carriers involved. The directions now given by the Court of Appeals to the court below to proceed in accordance with its own opinion *and* this Court's earlier opinion would result in effectually circumventing this Court's opinion and mandate. Essentially, the first question presented is whether the Court of

* 347 U. S. 298 (April 5, 1954) R. Vol. VII, p. 213.

Appeals rather than this Court may decide whether this Court's mandate has been obeyed.

II. It has repeatedly been determined that the Debtor's stock is worthless and the Court of Appeals admits that no one has challenged that determination. Nevertheless, the Court of Appeals has now adopted the remarkable contention of the Atlantic Coast Line that this Court by its opinion of April 5, 1954 created some value for that stock. It is clear from the record that the Atlantic Coast Line now is attempting to use the Debtor's sole shareholder as its cat's-paw. The contention that the stock has now been endowed with a newly-created value is based upon a footnote to this Court's opinion, which obviously has been misconstrued. Accordingly, the second question presented is whether such erroneous "interpretation" of that footnote is to be allowed to stand. The decision of this question is of the utmost importance in all future proceedings herein.

III. No party in interest having asked the District Court to return the Section 77 proceedings to the Interstate Commerce Commission, that Court dismissed the bankruptcy proceeding and returned the case to the equity foreclosure cause. The Court of Appeals reversed such action, notwithstanding the lack of any motion of the type contemplated by Section 77 (e), and held that the case must remain in bankruptcy. Here is presented the question of whether the Court of Appeals reversal was not in direct conflict with the requirements of Section 77 (e).

IV. After this Court had ruled that the plan considered by it was defective and for that reason had reversed an earlier Court of Appeals decision

which had directed that the plan be "approved", the question is presented whether the Court of Appeals may now say that its previous decision has not been overthrown, made void, undone or annulled; and whether one of its Judges may maintain in his concurring opinion that the earlier holding "that the plan was a good one" remains as "the law of the case" and that "The Supreme Court did not find anything wrong with the plan itself".

V. This Court ruled that the very heart of Section 5 of the Interstate Commerce Act is that a merger may be approved "only if it originates" as a voluntary proposal by the merging carriers and that, because this plan was imposed by Commission fiat, it had a congenital defect and "it matters not that the security holders might ultimately accept the plan". An additional question raised by the opinion of Circuit Judge Holmes is whether, in the face of this Court's decision, it may now be ruled that "consent" *after* the "approval" of the plan is *all* that is required, and that *any* proceedings under Section 5 of the Interstate Commerce Act *shall* take place *after* "confirmation" of the plan.

Statutes Involved

The chief statute involved is Section 77 of the Bankruptcy Act, the pertinent portions of which are:

> "(e) * * * If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion

and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. * * *" (Sec. 77, Bankruptcy Act, Title 11, U. S. C., Sec. 205 (e)). (Italics supplied.)

"(g) * * * If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest *or on his own motion,* after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order" (Sec. 77, Bankruptcy Act, Title 11, U. S. C., Sec. 205 (g)). (Italics supplied.)

"(i) * * * Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such

terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administrative expenses and allowances in the proceedings hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided" (Sec. 77, Bankruptcy Act, Title 11, U. S. C., Sec. 205 (i)).

Statement of the Case

The Debtor, Florida East Coast Railway Company, is being reorganized. At the outset, there was an equity receivership. Little progress was made, largely because of insufficient earnings. In January 1941 the case was transferred to the bankruptcy court because certain holders of First and Refunding Mortgage Bonds (usually referred to herein as the 5% bonds) believed it necessary to modify the underlying issue of First Mortgage Bonds, then outstanding in the amount of $12,000,000. For almost 14 years since then, efforts to reorganize have continued, without success, under Section 77.

After 1941 greatly improved railroad conditions were enjoyed generally, and the Florida East Coast shared the upturn. With resulting accumulations of cash the bankruptcy trustees have purchased (for the account of the 5% bondholders) part of the underlying bonds, so that today only about $8,000,000 principal amount are outstanding, and there is accumulated cash more than sufficient to cover all this prior debt. All recent reorganization plans have provided that the underlying bonds still outstanding will be

paid off in full, either upon consummation of the plan or at their maturity on June 1, 1959. The Debtor's stock is worthless. Thus, except for unsecured creditors entitled to participate in the proceeds of unmortgaged assets, the only security holders to be affected by the reorganization are the 5% bondholders.

The Commission has formally declared that these 5% bondholders are "prior to the reorganization of the debtor, the *equitable owners*" of the Debtor's property (282 I. C. C. 81 at p. 186). (Italics supplied.)

This Court's opinion of April 5, 1954, held the most recent reorganization plan invalid, declaring that it had a congenital defect because it called for the merger of the Debtor with the Atlantic Coast Line under a merger plan that had not been initiated by the two carriers themselves as required by Section 5 of the Interstate Commerce Act. This Court held that the defect could not be cured subsequently, even by ratification or a vote of the Florida East Coast security holders, saying "it matters not that the security holders might ultimately accept it if it were put to them for a formal vote", that such a "Hobson's choice" was not the equivalent of the initiation required by Section 5.

The respondent, Atlantic Coast Line, petitioned this Court for a rehearing, indicating that, if permitted to do so, it would introduce evidence it thought relevant to the subject of the "initiation" of the merger plan. That rehearing petition was denied by this Court. No permission to introduce additional evidence was granted.

Following this Court's decision, the Atlantic Coast Line asked the District Court to reopen the record to take evidence. It also made a motion for approval

of the same reorganization plan by the District Court. In that way it asked the District Court to disregard, overrule or circumvent this Court's decision. It urged that the plan, which this Court had found to be defective and invalid, was nevertheless "a good plan". It persisted in offering the same evidence which this Court had declined to entertain.

The new evidence which the respondent offered to the District Court was of two general classes, namely, (1) that for some years the Atlantic Coast Line had what the respondent called a "verbal option" to purchase all of the Debtor's outstanding stock (although the purported option was unwritten and no price for the stock was ever agreed upon), and (2) that following this Court's decision of April 5, 1954, the trustee of a trust which owned all the Debtor's stock had attempted *nunc pro tunc* to "initiate" the merger plan on behalf of the Debtor.

In answer to a question from the Court, the president of the Atlantic Coast Line also testified that the stock of the Debtor was "made of value by the Supreme Court of the United States on April 5, 1954". He further testified that such value was not merely "a nominal figure" (R. Vol. VII, pp. 84-7).

The 5% bondholders asked the District Court to dismiss the Section 77 proceedings and to permit the bondholders, after this delay of almost fourteen years, to resume the foreclosure of their lien upon the mortgaged property. In 1952, the representatives of 75% of the outstanding 5% bonds filed written motions to that effect and a similar motion was filed by the mortgage trustees acting for the holders of 24% of the outstanding bonds, not otherwise represented in these proceedings (R. Vol. I, pp. 1, 21-23, 125-6, 166-7, 169),

and the same parties renewed that motion at the 1954 District Court hearing (R. Vol. VII, pp. 55-6).

No one made any motion to have the matter referred back to the Interstate Commerce Commission.

The District Court tentatively received some of the evidence offered, over the objection of the 5% bondholders, but later ruled that all of the evidence was "wholly irrelevant". The District Court held as to the alleged option that "No such option does or ever has existed", basing its action on the fact that the so-called option had never been reduced to writing and had never fixed a price or a formula by which the price could be determined (Appendix I, p. 28).

As to the stockholders' attempt to cure the original defect by an *ex post facto* ratification, the District Court said:

> "* * * as this Court interprets the decision of the Supreme Court, the origin of the plan was such as to preclude its being made effective. The situation is and has been that the plan is a nullity. This Court holds that, to be valid, a merger plan submitted by the Interstate Commerce Commission must not only have the consent of the carriers affected, but must be *initiated* by them" (R. Vol. VII, pp. 129-30; Appendix I, p. 28). (Italics supplied.)

The District Court refused to grant the Atlantic Coast Line's motion for "approval" of the plan. It ruled that the bankruptcy proceedings should be dismissed and that the previously-existing equity foreclosure cause should be reactivated (Appendix I, p. 31).

Instead of applying to this Court to determine whether the action of the District Court had complied with this Court's mandate, the Atlantic Coast Line thereafter appealed to the Court of Appeals, Fifth Circuit. The 5% bondholders, who are, according to the Commission, the "equitable owners" of the Debtor's property, moved to dismiss the appeal on the ground that this Court alone, the court which had issued the mandate, had jurisdiction to determine whether that mandate was complied with (R. Vol. VII, pp. 372-8).

The Court of Appeals, with two separate concurring opinions (which it is respectfully submitted are confusing and conflicting), has now denied our motion to dismiss the appeal, and it has reversed the District Court (Appendix II, pp. 41-2; R. Vol. VII, p. 395). It does not discuss the motions to dismiss. It merely asserts that its "appellate jurisdiction in this matter is full and complete" citing Section 2106 of Title 28, U. S. Code (Appendix II, p. 40).

In doing this the *per curiam* opinion concedes that the District Court had no alternative but to disapprove the plan which this Court has declared illegal. The Court of Appeals, however, adopts the contention made from the witness stand by the president of the Atlantic Coast Line that this Court's opinion of April 5, 1954, in some fashion created a previously non-existent value for the Debtor's stock. In reaching this extraordinary conclusion the Court of Appeals itself recites that the claims ahead of the stock "total well in excess of $80,000,000" and that all findings of value of the Debtor's assets fix a total "well under $50,000,000".

In the face of these figures indicating that a deficit of about $30,000,000 would have to be made up before the stock could have any value, the Court of Appeals asserts that as a result of this Court's April 5, 1954 opinion (and apparently in particular as a result of footnote 12 to that opinion) the stock has now become valuable. The Court of Appeals says that this newly-created value is "of an unreal quality", that it was "derived instantly" from this Court's decision "just as Pallas Athene fully armed stepped out of the head of Zeus", that it is "artificial value" but that nevertheless the District Court should not have disregarded it (Appendix II, p. 34).

The Court of Appeals holds that the Section 77 proceeding should not have been dismissed. It indicates that the proceeding should have gone back to the Commission. Its opinion does not deal with the statutory language which provides that "on motion of any party in interest" the judge may in his discretion refer the proceeding back to the Commission, nor with the fact that there was no such motion.

The Court of Appeals, moreover, approves the introduction of additional evidence, ignoring our objection that the record may not be so supplemented, upon remand, without the express leave or order of this Court, after this Court had disposed of the case on the merits.

The separate concurring opinion of the senior circuit judge sitting on the case, one of the three opinions on which the Court of Appeals action is based, holds that a consent to the proposed merger *after* the "approval" of the plan is all that is required by Section 5 of the Interstate Commerce Act and, in fact, that *any* proceedings under Section 5

"shall" take place *after* "confirmation" of the plan (Appendix II, pp. 42, 43). In both respects such "interpretation" of this Court's decision is in direct conflict with the opinion of this Court.

The same judge has also ruled that this Court's decision of April 5, 1954 "was not on the merits of the plan itself except insofar as it related to a forced merger" and that "except as to the merger provisions" the previous holding of the Court of Appeals *en banc* (which this Court had reversed) "that the plan was a good one" is still the "law of this case" (Appendix II, p. 44). The same view is indicated in the *per curiam* opinion (see Appendix II, p. 33), where the Court of Appeals suggests that substantially all of its earlier decision stands untouched notwithstanding the reversal by this Court.

The Court of Appeals seems to fear that if the case does not remain under Section 77 there will be lost the expert guidance of the Interstate Commerce Commission. This disregards the fact that the Commission possesses under Section 20 (a) of the Interstate Commerce Act a continuing control and supervision over all railroad financing. A necessary step in the accomplishment of any reorganization pursuant to an equity foreclosure must be the filing of a petition with the Commission for approval of the securities to be issued, proposed fixed charges, and similar details. The Commission is directed to hold public hearings with a view to protecting the interest of the public. Under the statutes the Commission is in a position to exert "leadership" in these matters whether its expert services are utilized in connection with Section 77 proceedings or otherwise.

With only one class of security holders now to be dealt with under the plan, a reorganization in equity

promises to be much more expeditious than could any Section 77 reorganization of this Debtor.

Basis of Federal Jurisdiction

Federal jurisdiction in the court of first instance is based upon the fact that the case comes properly within the provisions of Section 77 of the Bankruptcy Act.

ARGUMENT

The Court of Appeals Erred in Undertaking to Determine Whether This Court's Mandate Had Been Obeyed

It is a well established principle that the court issuing a mandate is the one to decide whether its mandate has been carried out properly.

In re Sanford Fork & Tool Co. (1895), 160 U. S. 247, 255-6;
Ex parte The First National Bank of Chicago (1907), 207 U. S. 61;
Mackall v. *Richards* (1885), 116 U. S. 45, 47-8;
Sibbald v. *U. S.* (1836), 12 Pet. 488, 492;
Texas & Pacific Railway v. *Anderson* (1893), 149 U. S. 237;

Although we urged, by motion to dismiss the appeal, that the question of whether or not the District Court had obeyed this Court's mandate was one solely for determination by this Court, the Court of Appeals usurped the functions of this Court by undertaking itself to decide that question. It compounded the error by incorrectly ruling (a) that this Court's opinion had given value to the worthless stock and (b) that the District Court should not have dismissed the bankruptcy cause.

The Court of Appeals Erred in Holding That the Worthless Stock Has Acquired Value

It has repeatedly been affirmed in this proceeding that the Debtor's stock is completely worthless. The *per curiam* opinion of the Court of Appeals correctly states:

> "The stock of this debtor on seven occasions has been held by the Interstate Commerce Commission to be without value, and no objection has ever been made to any of these findings. The claims ahead of the stock, including the principal and interest of its First Refunding Mortgage bonds, total well in excess of $80,000,000 while all the findings of the value of the assets that would be available toward the satisfaction of those claims fix the value at well under $50,000,000." (Appendix II, p. 34)

Similarly, the late Circuit Judge Strum, sitting as the District Court, in his opinion of June 28, 1954 stated:

> "Also the Court is not satisfied that initiation and approval of the merger or absorption plan by the Florida East Coast Stockholders, even had it been timely, would have been sufficient in this case. It is clearly established by the record that the stock of the debtor has no value, and that this stock has never had any value during the pendency of these proceedings. The assets of the debtor are substantially less than the claims of creditors to be satisfied from those assets. There is no possible equity for stockholders after payment of the proved debts. I am loath to be-

> lieve that any action taken by the holders of this worthless stock would be of any significance. Both the Interstate Commerce Commission and this Court have held that the 5% bondholders are the equitable owners of the Railway, and it would be intolerable to give the worthless stock power to control its disposition" (R. Vol. VII, p. 131; Appendix I, p. 30).

The Court of Appeals nevertheless reversed Judge Strum and held that the worthless shares had regained some sort of artificial value, that holding being based on a misconstruction of footnote 12 of this Court's April 5, 1954 opinion.

Clearly, if by that footnote this Court had intended to permit the worthless stock to initiate a merger, it would have granted the petition for rehearing dated April 19, 1954 filed herein by the Atlantic Coast Line. That petition attempted to interpret footnote 12 as follows:

> "What this Court has said is that Florida East Coast Railway Company or the Bingham Trust must take some affirmative action if there is to be a valid plan" (R. Vol. VII, p. 322).

Coupled with that "interpretation" was an offer by the Atlantic Coast Line to submit evidence that the Bingham Trust held all the stock of the Debtor, Florida East Coast, and that its trustee was president of the Debtor, plus evidence showing that Atlantic Coast Line held an option to acquire all the Debtor's stock. In short, that rehearing petition proclaimed that Atlantic Coast Line was in control, so that it readily could cause the debtor corporation or the Bingham Trust to take affirmative action to bring about a merger (R. Vol. VII, pp. 318-9).

This Court denied that petition for rehearing, but now the Court of Appeals has accepted the arguments there advanced and has used them as the basis for its opinions reversing the District Court. The interpretation of footnote 12 which was advanced in the petition for rehearing and rejected by this Court is the cornerstone of the Court of Appeals decision.

Footnote 12 should be construed within the framework of the paragraph (in the main body of this Court's opinion) to which it was appended. The central idea of that paragraph is that this Court's holding (*i. e.,* that the Commission may not initiate a merger of carriers) does not mean that there can be no merger of a debtor railroad involved in a Section 77 reorganization. In relation to that central thought, footnote 12 merely explains that pendency of a Section 77 proceedings does not, in and of itself, end either the debtor's existence or the possibility of carrier-initiation of a merger plan.

The footnote states that "those who *in the absence of* § 77 would wield the corporate merger powers" are the persons who must initiate any merger now. (Italics supplied.) Who are those persons? This Court stated earlier in its opinion that the 5% bondholders are "in substance the owners of the debtor corporation" (347 U. S. at page 301), just as the Commission had previously declared them the "equitable owners". This Court also held that the plan was invalid because it was "initiated by the Commission rather than by their own corporation" (347 U. S. at pp. 313-4). Under any fair and equitable reorganization plan, these bondholders are entitled to control the debtor railroad or the reorganized corporation; and, *a fortiori,* "in the absence of § 77" such 5% bondholder control would have been perfected years ago, from

foreclosure or other enforcement of creditors' rights. Accordingly it follows that in this case the 5% bondholders are those who are entitled to wield the corporate merger powers.

The rule, of course, would be different if there were any equity remaining for the stockholders, as might well be the situation in another case.

When so read in context, footnote 12 cannot properly be construed as holding that in the case of a carrier in bankruptcy proceedings the decision as to initiating a merger must be made by the holders of its concededly worthless stock. The Court of Appeals has taken the footnote from its context, then has treated it as the heart of the decision and finally, in doing this, has distorted its meaning. This is just what the Atlantic Coast Line itself tried to do, without success, in its April 19, 1954 petition to this Court for a rehearing, which this Court denied (R. Vol. VII, pp. 318-9, 322-4).

While we are discussing footnote 12, it may be in order to mention its last sentence which pointed out that Section 77(d) not only permits but requires the debtor railroad itself to file a plan of reorganization. At the time that footnote was written, this Court's attention had not been called to the fact that the reorganization court, at the Debtor's request, had early in this case, by its order of January 31, 1941, ex-expressly relieved the Debtor from any duty under Section 77 to file any plan of reorganization. The Debtor, in its very first pleading in the case—the one in which it asked to be so relieved of any such duty—had admitted that the total value of its assets was far less than the amount due on its mortgage bonds (R. Vol. VII, pp. 6-7).

The Court of Appeals believes that the previous opinion of this Court has endowed the stockholders with a valuable position. Such endowment, if it is to have value in any ordinary sense, must be the privilege to force the lien creditors to make concessions to them or, in the alternative, the privilege to collect from Atlantic Coast Line a premium for aiding it. In *Case* v. *Los Angeles Lumber Co.,* this Court said that

> "To hold that * * * creditors of an obviously insolvent debtor may be forced to share the already insufficient assets with stockholders * * * would disregard the standards of 'fair and equitable' " (308 U. S. 106, at 124).

Here, we feel sure that this Court will deem it likewise unfair and inequitable for the stockholders to be given the privilege of using their worthless shares to secure some consideration (and not merely a "nominal value"—R. Vol. VII, p. 87) from Atlantic Coast Line for assisting in initiating the merger plan which the latter so greatly desires. Such must have been the aim of the purported option to purchase the shares, otherwise worthless, which Atlantic Coast Line unsuccessfully attempted to establish that it held—and presumably was prepared to exercise. The entire concept is contrary to the rule of the *Boyd* case (*Northern Pacific Railway* v. *Boyd,* 228 U. S. 482) and the long line of decisions following that principle.

Section 77 (e) Requires a Motion by a Party in Interest If the Case Is to Be Referred Back to the Commission

The situation with which the District Court had been presented was as follows: This Court's opinion had made it necessary for the District Court to dis-

approve the plan. The Court of Appeals concedes that (Appendix II, p. 41).

Subdivision (e) of Section 77 of the Interstate Commerce Act provides that if the District Judge shall not "approve" the plan "he shall enter an order in which he may either dismiss the proceedings, or in his discretion *and on motion of any party in interest* refer the proceedings back to the Commission for further action." (Italics supplied.) Had "any party in interest" made a "motion" to refer the proceedings back to the ICC, the District Court would have been able to exercise its discretion as to whether or not that motion should be granted—or whether, in the alternative, he should "dismiss the proceedings". Without such a motion by a party in interest, however, there was no authority in law for the exercise of discretion. The District Court had no alternative but to dismiss.

Had Congress meant to give the District Court discretion to refer the case back to the Commission whether or not any party had so moved, Congress would have used language similar to that of Section 77 (g), which provides that where there has been undue delay "the judge, in his discretion, shall, on motion of any party in interest *or on his own motion*" dismiss the proceedings. In neighboring subdivision (e), which governs the District Court in this case, the words "or on his own motion" do not appear.

This Court's Reversal of the Previous Decision of the Court of Appeals Reversed That Decision *in Toto*

As already pointed out in the statement of the case, one, and perhaps two, of the three opinions upon

which the action of the Court of Appeals was based disregarded the fact that this Court had found the plan defective (Appendix II, pp. 33, 44). The Court of Appeals cites Webster's dictionary to show that to reverse a judgment means to make it void, to undo or annul it, but then proceeds as if this Court had merely modified and otherwise affirmed the earlier decision of the Court of Appeals. This is based upon the fact that this Court had limited the scope of its writ of certiorari and had held that the "sole question" before it for decision is whether the Commission has power under Section 77 to submit a plan whereby a debtor railroad would be compelled to merge with another having no prior connection with it (See 347 U. S. 298, at page 299). As a result, the Court of Appeals holds that most of its own earlier decision remains in full force and effect. This Court did not so limit its reversal. It ruled that the "judgment [of the Court of Appeals] is reversed and the case is remanded to the District Court for further proceedings in accordance with this opinion" (347 U. S. 298, at page 315). That obviously was not intended as an affirmance, even in part.

Circuit Judge Holmes went on to assert directly in his opinion that the earlier holding of the Court of Appeals to the effect that the plan was a "good" plan stands as the "law of this case". He also declared, in the face of this Court's ruling to the contrary, that only *after* "approval" and even "confirmation" of the plan is it necessary to get the consent of the security holders to the proposed merger. This Court had clearly ruled that such a "Hobson's choice" should *not* be put to the security holders. In both respects, the Circuit Judge is undertaking to overrule this Court's April 5, 1954 opinion.

Conclusion

When the case was before this Court previously, counsel for these petitioners, in answer to a question of Mr. Justice Douglas, declared in substance:

> "We stand fast on the proposition that nobody who has no interest in this road has any right to speak for it * * *. The stockholders haven't a penny of interest in the road, and they haven't shown up in the litigation. It has been found that the stock is worthless. The road just belongs to these bondholders."

That was our position then. It is our position now.

Until this Court handed down its opinion, the Debtor's sole stockholder had taken no part in the proceedings, except in 1941, when he admitted that the stock was worthless, asked to be relieved of any duty to file a plan, and obtained such relief from the District Court.

At the present time, it is being asserted that not only has the same stockholder regained his position but that he has acquired a power to propose turning over the property of the 5% bondholders lock, stock and barrel to the Atlantic Coast Line, which long has coveted this prize. Rejection by this Court of any such proposition is the only way to settle the course of this reorganization.

We see no basis for the assertion that by a footnote in its opinion this Court intended to vest in the worthless stock a dominating power, or any power, in connection with the reorganization. An observation in the footnote that the debtor corpora-

tion is still in existence is quite different from a decision that the worthless stock, and not the 5% bondholders, may speak for that corporation.

This Court should take back the case, to clarify the situation. The three opinions filed in the Court below are no adequate chart for the future. It is futile to proceed with the reorganization without knowing who is entitled to speak for the Debtor. Without an authoritative decision by this Court, the result will be confusion, conflicting plans and a further fruitless expenditure of time and effort. Justice and good sense require that the parties now be given the essential guidance.

Also, this Court should uphold and support the rule that it has exclusive jurisdiction to interpret its own mandate and to determine whether there has been compliance. The Court of Appeals has plainly usurped authority to perform this Court's function. It was led to that error through the election of the Atlantic Coast Line to ask review of the decision of the District Court by the Court of Appeals rather than by this Court. The case now is presented to this Court, where it should have gone immediately if the District Court's action was to be reviewed. This Court should accept the opportunity to set the record straight and to permit the equitable owners to go forward with a prompt reorganization.

Respectfully submitted,

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APPENDIX I

Opinion of the District Court, Filed—June 28, 1954

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

In Proceedings for the Reorganization of a Railroad

No. 4827-J

In the Matter of

FLORIDA EAST COAST RAILWAY COMPANY,

Debtor.

PER CURIAM:

This matter came on to be heard before this Court on the 21st day of June, 1954, all parties having been notified to appear and present their views as to what action this Court should now take in the light of the judgment and mandate of the Supreme Court of the United States.

Counsel representing the holders of the 5% Refunding Bonds of the Railway Company asked the Court to now adhere to and confirm its order herein of March 11, 1952, modified only in two particulars, namely, (a) fixing a new effective date for said order; and (b) because of the death of Scott M. Loftin named in the order of March 11, 1952, as a Reorganization Trustee in this cause and an Equity Receiver in cause No. 757-Equity, directing that the turnover should be made by John W. Martin as sole surviving Reorganization Trustee to John W. Martin as sole

Equity Receiver. Such action was objected to only by the Atlantic Coast Line, which through its counsel asked the Court to grant its motion filed herein, dated May 26, 1954, to now approve the plan approved by the Interstate Commerce Commission October 25, 1951, and certified to this Court November 7, 1951.

The Supreme Court considered only one question, namely, whether the Commission had statutory power to certify the plan which involved absorption of the Florida East Coast Railway and acquisition of all its property, where the Florida East Coast Railway had neither initiated the plan or agreed to it. It held that because one of the carriers involved had never agreed to the plan and had no part in initiating it, the plan was unauthorized. The majority opinion says:

> "The sole question for decision in this case is whether the Interstate Commerce Commission has the power under Sec. 77 of the Bankruptcy Act to submit a plan of reorganization to a district court whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor. Answer to this problem depends on understanding of a long legislative history.
>
> The crucial question, therefore, is whether this merger plan meets the statutory requirements. Since it does not, as we have found, because it is sought to be imposed by Commission fiat rather than proposed by the merging carriers, it matters not that the security holders might ultimately accept it if it were put to them for a formal vote. The kind of Hobson's choice, more or less,

to which security holders are put when voting on a merger plan is not to be put to them on a plan initiated by the Commission rather than by their own corporation. And so, if a plan does not satisfy the basic conditions which circumscribe the Commission's power, it has a congenital defect, and any interested party can object to its attempted effectuation."

At the conclusion of its opinion the Supreme Court ruled, without reservation, that the judgment of the Court of Appeals is reversed and "the case is remanded to the District Court for further proceedings in accordance with this opinion". The effect of that decision and order was to wholly, not partially, nullify the judgment of the Court of Appeals; to completely abrogate the proposed plan of reorganization; and to grant leave to this Court to further proceed in any manner authorized by law and consistent with the Supreme Court's opinion. The decision renders the plan presently proposed congenitally and irrevocably defective because not initiated by both carriers involved.

More than two years ago this Court dismissed this bankruptcy proceedings in the exercise of its discretion under 77(e) and 77(g) of the Bankruptcy Act (11 USCA 205); the latter subsection dealing with unreasonable delay in reorganization. The situation today is even more aggravated. More than two additional years have passed, without progress, and in the light of present conditions the Court again finds, with added reason, and after having examined the recommendations of the Interstate Commerce Commission, that unreasonable delay has occurred. The

plan for an internal reorganization agreed to by the holders of the 5% Refunding Bonds, and filed in the cause, opens the way for a speedy internal reorganization in the equity foreclosure case.

The motion of the Atlantic Coast Line to put into effect the plan just held by the Supreme Court to be unauthorized by law and congenitally defective would disregard the mandate, not obey it.

The proof offered by the Atlantic Coast Line respecting its alleged option to buy the stock of the Florida East Coast Railway is wholly irrelevant. No such option does or ever has existed. The Atlantic Coast Line concedes that no price at which the option could be exercised has ever been agreed on. The option is and always has been a nullity. No attempt has ever been made to exercise it.

The attempt to prove that the trustee under the Mary Flagler Bingham Will has adopted the present illegal plan discloses no corporate action by the Florida East Coast Railway.

Furthermore, as this Court interprets the decision of the Supreme Court, the origin of the plan was such as to preclude its being made effective. The situation is and has been that the plan is a nullity. This Court holds that, to be valid, a merger plan submitted by the Interstate Commerce Commission must not only have the consent of the carriers affected, but must be *initiated* by them.

In *Schwabacher* v. *United States,* 334 U. S. 182, 92 L. Ed. 1305, the question in the case of a voluntary merger was whether the Commission could properly refuse to take jurisdiction of the claims of preferred stockholders demanding par value and accrued dividends for cumulative preferred stock. In the course

of the opinion the Court had occasion to comment on the meaning and effect of the provisions of the Interstate Commerce Act so adopted in 1920. The majority opinion by Mr. Justice Jackson quotes Section 5 at length and describes it as providing for voluntary mergers. He said (p. 193):

> "It authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation."

In his dissenting opinion Mr. Justice Frankfurter, referring to the fact that Congress had been asked in 1920 to eliminate waste and inefficiency by providing for compulsory combinations, and to do away with the system of operation of railroads by State corporations, said:

> "Congress rejected both demands. It left mergers of separate railroad properties to the will of their private owners, merely lodging a veto power in the Commission."

While the question in the *Schwabacher* case is not involved here, the fact that the Court gave to Sections 1 and 5 of the Interstate Commerce Act, added in 1920, the same meaning that we now do, and held that initiation and formulation of a merger plan by the carriers was as vital to its invalidity as consent, is quite material.

The power of initiation gives the carriers the power to choose all the terms of the merger. A merger plan initiated by the Commission would give the carriers only the power to agree to the Commission's idea of what the merger should be, which is a very different

thing. As the Supreme Court has said, that kind of Hobson's choice is not to be put to these security holders.

This Court is also of the opinion that the attempted "adoption" of the plan comes too late, and that the invalidity of the Commission's plan is now *res judicata.* Being congenitally defective, there are no means of activating it.

Also the Court is not satisfied that initiation and approval of the merger or absorption plan by the Florida East Coast Stockholders, even had it been timely, would have been sufficient in this case. It is clearly established by the record that the stock of the debtor has no value, and that this stock has never had any value during the pendency of these proceedings. The assets of the debtor are substantially less than the claims of creditors to be satisfied from those assets. There is no possible equity for stockholders after payment of the proved debts. I am loath to believe that any action taken by the holders of this worthless stock would be of any significance. Both the Interstate Commerce Commission and this Court have held that the 5% bondholders are the equitable owners of the Railway, and it would be intolerable to give the worthless stock power to control its disposition. In any event, whatever action the stockholders may have taken following the submission to the Supreme Court was too late to alter the status of the plan that was considered by that Court and found to be congenitally defective.

Furthermore, on January 25, 1941, the Florida East Coast Railway Company filed an answer to the petition filed on behalf of the First and Refunding

5% Bonds for the institution of proceedings under Sec. 77, in which petition it was alleged that the debts of the Florida East Coast Railway exceeded its assets. That answer admitted the asset deficiency. It also asked the Court to relieve the Florida East Coast Railway "of any duty under Sec. 77 to file a plan of reorganization".

The Court's order of January 31, 1941, states in paragraph 21, "the debtor is hereby relieved from any duty under Sec. 77 of the Bankruptcy Act to file any plan of reorganization".

The Florida East Coast Railway Company, therefore, conceded long ago that its stock was worthless and asked this Court to make an order relieving it from participation in the formulation of a reorganized plan under Sec. 77, which the Court did.

The effect of those proceedings was to eliminate the Florida East Coast Railway Company and its stockholders, at their request, as factors in the preparation or adoption of any reorganization plan.

For these and other reasons the debtor railway should go back into equity receivership, so that the speedy plan of reorganization there available may be consummated by the 5% Bondholders, who are the equitable owners of the property, and so that any person or persons desiring to buy the road shall be offered a fair opportunity to bid for it.

/S/ LOUIE W. STRUM.
Louie W. Strum,
United States Circuit Judge,
Sitting as District Judge,
Pro hac vice.

APPENDIX II

[380]

Opinion of the Court, Concurring Opinion of Holmes, Circuit Judge, and Specially Concurring Opinion of Russell, Circuit Judge, Filed—November 5, 1954

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15244

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

VERSUS

ST. JOE PAPER COMPANY, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(November 5, 1954.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

PER CURIAM: The motion to dismiss should be overruled because this appeal involves entirely new issues, which were not decided or considered by the Supreme Court, and not disposed of by its reasoning or judgment, when this case was before it. 345 U. S. 948. The Supreme Court reversed the judgment of the

Court of Appeals, and remanded the case to the District Court for further* proceedings in accordance with its opinion; but it did not give any particular directions to the district court and did not reinstate the latter's judgment which had been reversed by the judgment of the Court of Appeals. 201 F. 2d 330. To reverse a judment, according to Webster's dictionary, means to overthrow it by a contrary decision, to make it void, to undo or annul it for error. The mandate of the Supreme Court directed that the judgment of this court be reversed, with costs, and that this cause be remanded to the district court for further proceedings in accordance with the opinion of the Supreme Court; but it further appears that the Supreme Court, by its writ of certiorari, had limited its own inquiry, and consequently its own jurisdiction, to the single question as to whether, under Section 77 of the Bankruptcy Act, the Interstate Commerce Commission had "a power to force mergers." 345 U. S. 948. By so limiting its writ of certiorari, the Supreme Court expressly declined to review (1) this court's reversal of the District Court's finding that said plan was neither fair nor equitable and did not afford due recognition of the rights of the 5% bondholders, particularly the minority group; (2) this court's reversal of the District Court's finding that there had been an unnecessary delay in a reasonably expeditious reorganization of the debtor; and (3) this court's reversal of the District Court's decision to dismiss the bankruptcy proceeding and turn the debtor's property over to an equity receiver.

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* Page 380 ends here in certified transcript.

Appendix II

This is the third appearance before us of this proceeding under Section 77 of the Bankruptcy Act. The debtor is the Florida East Coast Railway Company, a Florida corporation, which owns a line of railroad be-* tween Jacksonville and Miami, Florida, together with terminals, rolling stock, and other assets. The stock of this debtor on seven occasions has been held by the Interstate Commerce Commission to be without value, and no objection has ever been made to any of these findings. The claims ahead of the stock, including the principal and interest of its First Refunding Mortgage bonds, total well in excess of $80,000,000 while all the findings of the value of the assets that would be available toward the satisfaction of those claims fix the value at well under $50,000,000. The only value that this stock has is of an unreal quality, which it derived instantly from the Supreme Court's opinion of April 5, 1954, just as Pallas Athene fully armed stepped out of the head of Zeus.

In his opinion of June 28, 1954, the District Judge failed to recognize this artificial value or disregarded its effect in the Supreme Court, and stated it to be clearly established by the record that this stock had no value, that it had never had any value during the pendency of this proceeding, and that there was no possible equity for stockholders after the payment of proven debts. Later he referred twice to this "worthless stock." The creditors committee, which instituted this proceeding in bankruptcy, alleged that the fair value of the debtor's property was less than the principal and accrued interest on its outstanding

* Page 381 ends here in certified transcript.

bonds. The debtor, in its answer, admitted all of the allegations in the petition, and prayed that it be relieved from any duty under Section 77 to file a plan of reorganization, in view of the fact that the petitioners were filing one. Impliedly conceding that it was the debtor's duty to file a plan, it prayed to be relieved* of any such duty, and the court granted this prayer. The order relieved the debtor of the duty to initiate a plan; it was not objected to or appealed from; and no question of its propriety or the jurisdiction of the court to make it was raised by any one.

At the hearing that preceded the order of June 28, 1954, from which this appeal was taken, the appellant offered evidence to show that the debtor had consented to the merger feature of the plan, as well as to its other provisions, and that no forced merger was contemplated by the plan so far as the debtor was concerned, because the latter had concurred in it initially, and had formally adopted it after the Supreme Court's decision. The majority of the Supreme Court thought that the plan would involve the application of force against the Florida East Coast Railway Company, as it spoke of the plan being forced or foisted upon the carrier or corporate entity; and the District Judge was of the opinion that the attempted adoption of the plan came too late, since it was "congenitally defective" and there were "no means of activating it."

The Atlantic Coast Line, on remand, also proffered evidence to show that there had been no change in conditions as a result of which the plan, found to be

* Page 382 ends here in certified transcript.

fair by this court on January 19, 1953, had become unfair by June 21, 1954; it further offered to prove that not merely had there been no change in conditions which had made the plan unfair, but that the trend had been the other way and, if any change had taken place, the plan was fairer than it was when previously approved. The court below refused this proffer of evidence, and dismissed* the bankruptcy proceeding on the ground that an unreasonable delay had occurred in the reorganization of the railroad. Thereupon, it ordered a turnover of the debtor's property to an equity receiver in the same court. This is the order that was appealed from and superseded in this case; it adhered to and confirmed the District Court's prior order of March 11, 1952, which had been reversed; it fixed August 1, 1954, at 12:01 A. M., as the effective date of dismissal of the petition for reorganization; and directed John M. Martin, as sole trustee in the reorganization proceeding, to turn over to John M. Martin, as sole equity receiver, all of the debtor's property. The effect of this order would be to eliminate the blended power of the court and the Commission, provided for by Section 77 in the reorganization of insolvent railroad corporations. The history of equity receiverships is not such as to inspire hope of any improvement by the change from bankruptcy to the equity side of the court. In *Palmer* v. *Massachusetts,* 308 U. S., p. 86, the court said:

"Until the amendment of March 3, 1933, rail-

* Page 383 ends here in certified transcript.

roads were outside the Bankruptcy Act. But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge* it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of Section 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates. The judicial process in bankruptcy proceedings under Section 77 is, as it were, brigaded with the administrative process of the Commission."

Since the United States District courts are courts of law (civil and criminal), equity, admiralty, and bankruptcy, it is ordinarily more logical to shift from an equity receivership to a bankruptcy proceeding than it is to reverse the movement. Courts of equity may enjoin suits at law and keep creditors at bay, but

* Page 384 ends here in certified transcript.

FEB 3 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 536

In the Matter

of

FLORIDA EAST COAST RAILWAY COMPANY,

Debtor,

ST. JOE PAPER COMPANY, a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, J. BRYSON AIRD and BANK OF THE MANHATTAN COMPANY as Successor Mortgage Trustees, RAILWAY LABOR EXECUTIVES' ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, and SOUTHERN RAILWAY SYSTEM AND AFFILIATED LINES,

Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI

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February 2, 1955

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they cannot discharge debts, reduce or adjust them, or otherwise impair the obligations of contracts; but the bankruptcy courts, within the limits of the Fifth Amendment, may do any and all of these things. They are not only courts of equity, but in a proceeding under said Section 77 they have an extraordinary nation-wide jurisdiction *in rem,* which is a caveat and injunction to all the world not to interfere with the *res* in bankruptcy. It is therefore, easy to see why the creditors committee sought relief in bankruptcy after ten fruitless years of an equity receivership, but no sound reason appears why this stale case should be reactivated after lying dormant during the bankruptcy period of almost 14 years. As between bankruptcy and a stale equity receivership, one may ask: "Could you on this fair mountain leave to feed, and batten on this moor?"

According to Blackstone, a bankrupt was formerly defined as "a trader who secretes himself and does certain other acts tending to defraud his creditors," 2 Bla. Com. 471; but at present the bankruptcy law, especially the federal statutes, are founded on principles of humanity as well as justice; and, to that end, they confer privileges on the debtor that tend toward his rehabilitation, while protecting the substantial rights of his creditors. Everything legislatively possible has been done that could be done to take the odium and hardship out of bankruptcy. In many of the chapters the insolvent persons are not even called bankrupts; they are referred to as debtors; provisions relating to bankrupts are deemed to relate also to debtors. Section 77 deals with the reorganization of insolvent rail-

roads, which are called debtors. Chapter 10 deals with corporate reorganizations, and "debtor" means a corporation by or against which a petition has been filed under the chapter. As an emergency measure, under bankruptcy jurisdiction, farmers could retain possession of their property, while a federal conciliation commissioner sought to win over creditors to a plan for their relief and rehabilitation. In the instant case, the bondholders' committee filed the suit in equity for a receiver, and 10 years later filed the petition under Section 77, which the lower court dismissed. ~~The Florida East Coast Railway Company has done nothing to impede this proceeding; [but the trouble is with the Interstate Commerce Commission's modifications of the plan]. It is sought to be avoided without voting on it, although it will probably be rejected by the creditors who are entitled to vote on it.~~*†

The advantages in bankruptcy of a sale of assets, free of liens or subject to liens, far outnumber those of selling property in an equity receivership. The latter has been tried and found wanting. *New England Coal & Coke Co.* v. *Rutland R. Co.* (C. C. A. 2d, 1947), 143 F. 2d 179. The order appealed from would jettison the services and expert knowledge of the Interstate Commerce Commission, which has worked on this case since 1941 and recommended more than one plan that has been rejected by the lower court. On a prior

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* Page 386 ends here in certified transcript.

† The last 6 lines of this text are "lined" out in the certified transcript. The 13 words in brackets were expressly deleted by the December 9, 1954 opinion of the Court of Appeals. The last sentence was previously deleted.

appeal, this court held that it was not proper for the District Court to try to wrest the leadership of this reorganization proceeding from the Commission, 201 F. 2d 138. In *Echner* v. *Western Pacific Railroad Corp.,* 318 U. S. 448, 468, the Supreme Court said that Section 77 manifests the intention of Congress to place reorganizations under the leadership of the Commission, subject to a degree of participation by the court. The bankruptcy court may order a sale of the *res* in its custody more advantageously than a court of equity is permitted to do it; in truth it is a court of equity with a statutory jurisdiction that ordinary courts of equity do not possess.

Our appellate jurisdiction in this matter is full and complete, Sec. 2106 of Title 28, U. S. Code; but we are confronted with a most extraordinary situation. In Note 12 of the Supreme Court's opinion, it emphasizes the importance of remembering that a railroad in a "Section 77 proceeding is not a defunct organism but remains a live and going concern." It further says: "See the references throughout Section 77 to 'the debtor' as an active entity; also *Van Schaick* v. *McCarthy,* 116 F. 2d 987, 992-993. During the entire period that the Florida East Coast* has been in receivership or Section 77 there have been annual stockholders' meetings at which a Board of Directors was elected. See the Florida East Coast's Annual Reports on file with the Interstate Commerce Commission. Indeed the desire to provide a ready remedy for the overhauling of a railroad's financial structure without im-

* Page 387 ends here in certified transcript.

pairing its primary responsibilities as a regularly functioning carrier was one of the principal reasons for the enactment of Section 77. See 5 Collier, Bankruptcy, Section 77.02. Thus it follows from the consistency clause, when viewed in the light of this corporate continuity of a railroad in reorganization, that those who in the absence of Section 77 would wield the corporate merger powers must initiate and work out the merger now. *Cf.* Section 77(d), which not only permits but requires the debtor railroad itself to file a plan of reorganization."

The trial judge said in his opinion of June 28, 1954, that he was loath to believe that any action taken by the holders of this worthless stock would be of any significance; that the effect of the reorganization proceedings was to eliminate the Florida East Coast Railway Company and its stockholders, at their request, as factors in the preparation or adoption of any reorganization plan. This statement went beyond the terms of the order itself, which relieved the debtor from any duty to file a plan but did not undertake to disqualify the debtor from consenting to a plan or even initiating one; it dealt with what the debtor was under duty to do, not with what it might do.

Under the decision of the Supreme Court the District Judge had no alternative but to disapprove the plan since* that court had declared it illegal. However, he erred in dismissing the Section 77 proceeding and returning the affairs of the debtor to the equity receivers. Accordingly, the order appealed from is RE-

* Page 388 ends here in certified transcript.

VERSED, and the cause remanded to the District Court with directions to take such further action as may not be inconsistent with the opinion of the Supreme Court and this opinion.

HOLMES, Circuit Judge, concurring:

The Supreme Court said that the plan of reorganization was congenitally defective, which means that the defect existed at and from the date of its birth. A congential defect is not necessarily incurable. The metaphor raises the question as to whether such a plan is born when filed by the parties, recommended by the Commission, approved by the court, assented to by the security holders, or at some other time. This is the latest plan that has been proposed; the others died aborning; it may be that a plan is not born until finally approved by the judicial process, and that it is in the making prior to the consummation of the brigaded powers of the court and the Commission. It is anomalous to speak of a plan as congenitally and irrevocably defective, as if it were a still-born creature, when the court merely held that it was defective at birth, an imperfect plan.

Accepting the Supreme Court's decision that there cannot be a merger or unification involving force or compulsion against a debtor corporation or its stockholders, the express provisions of the statute make it clear that a con*sent after the approval of the plain is

* Page 389 ends here in certified transcript.

all that is required. Section 77(d) of the Bankruptcy Act explicitly provides that a reorganization "may be different from any plan which has been proposed." Section 5(2) of the Interstate Commerce Act expressly provides that when a plan for a unification is submitted to the Commission, the latter may prescribe "such terms and conditions and such modifications as it shall find to be just and reasonable" and that it may approve the plan "upon the terms and conditions, and with the modifications so found to be just and reasonable." Both statutes clearly contemplate that the Commission may modify unification plans which are submitted to it. Since both statutes authorize the Commission to modify the terms of a proposed merger, and any required consent to a plan that has been modified by the Commission must come after the modification, there is no basis for the suggestion that there must be a consent to any modification in advance of the time when it is made by the Commission. Moreover, the consistency clause of Section 77(f) provides that, upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of any securities, assumptions of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, to the extent contemplated by the plan. It thus expressly contemplates that any proceedings under Section 5 of the Interstate Commerce Act shall take place after confirmation of the plan. The 1935 revision of Section 77 did more than change the location of the consistency clause; it added the words "upon confirmation of the plan," which are

highly pertinent in determining when any action required by the consistency clause must be taken.*

In the light of the Supreme Court's self-restricted jurisdiction and the first sentence of its opinion, it was proper for the Atlantic Coast Line to show, on remand for further proceedings in accordance with the court's opinion, that the Florida East Coast Railway Company was not being compelled and would not be compelled to merge with the Atlantic Coast Line. The Supreme Court did not find anything wrong with the plan itself. The defect found by the court, on the record before it, related solely to the part, or the apparent lack of part, that the Florida East Railway Company had taken in the proceedings.

The Supreme Court's decision was not on the merits of the plan except in so far as it related to a forced merger. The opinion of the court of appeals on all other provisions of the plan was not within the scope of the writ of certiorari. It was a decision of the court *en banc,* and may not be overruled by a division of three judges. Except as to the merger provision, its holding that the plan was a good one is the law of this case. In raising a new point of law, the Supreme Court did not intend to shut out proof upon any issue of fact emerging therefrom. Out of the facts the law arises; and new or additional facts may alter a court's decision.

When the petition for a reorganization in this case was approved by the judge as properly filed and as having been filed in good faith, the old equity receiver-

* Page 390 ends here in certified transcript.

ship became moot and should have been dismissed, because the bankruptcy court immediately was vested with exclusive jurisdiction of the debtor and its property wherever located; and, in addition to the other powers con*ferred by Section 77(a) of the bankruptcy act, the district court was granted all the powers, not inconsistent with said section, which a federal court would have had if it had appointed a receiver in equity of the property of the debtor. Accordingly, it was not necessary or proper for the district court, by a summary order in a moot case, to revive powers that it already possessed in the bankruptcy proceeding. 11 U. S. C. 205(a). The bankruptcy proceeding that was to be dismissed had exclusive jurisdiction of the debtor and its property; the moot equity case had jurisdiction of neither while the bankruptcy proceeding was pending.

RUSSELL, Circuit Judge, concurring specially:

Even casual consideration of the past proceedings and rulings[1] in this matter will reveal grounds for substantial argument as to what is, as often denominated, "the law of the case". However, it would be unusual,

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* Page 391 ends here in certified transcript.

[1] *In re: Florida East Coast Railway Co.*, 81 F. Supp. 926, affirmed 179 F. 2d. 538, certiorari denied 339 U. S. 929; *In re: Florida East Coast Railway Co.*, 103 F. Supp. 825; *Atlantic Coast Line Ry. Co.* v. *St. Joe Paper Co.*, 201 F. 2d. 325, certiorari granted 345 U. S. 948, reversed 347 U. S. 298, rehearing denied 347 U. S. 980. See also, *In re: Florida East Coast Ry Co.*, 49 F. Supp. 527 and *In re: Florida East Coast Ry. Co.*, 52 F. Supp. 420.

to say the least, to attribute to the Supreme Court an intention to abandon determination of the important, if indeed not the controlling, question which had underlain the prior decisions of the trial and the Appellate Courts, and to which alone the Supreme Court had restricted itself upon the grant of certiorari. With much more logic and respect might it be assumed that the court was deciding the case as made and presented with the result that the decision* should be construed to hold that the equitable owners of the property supplant in interest the holders of the worthless stock and are thus entitled to the say-so on the question of merger which would ordinarily be enjoyed by the stockholders of a corporation. This view certainly finds abundant support in the unquestioned principle that in bankruptcy creditors are, and always have been, considered the real parties at interest as concerns the property of the bankrupt until their claims are satisfied. In any event, and this I think controlling here, no court, acting on the premise that a "forced merger" was *illegal* (as now determined) has ever held the plan of reorganization promulgated by the Interstate Commerce Commission fair and equitable in the face of the objections of the overwhelming majority in amount of the equitable holders of the property. This feature of the case, if not determined by the Supreme Court as above indicated, is an open question. Clearly, an illegal plan is not fair and equitable. Even if the taint of illegality should be removed, in this case, where this is effected by the acts of those having no interest in

* Page 392 ends here in certified transcript.

the *res,* and is opposed by the real owners of the property, I should still be of the opinion that such a plan is inherently unfair and should not be approved by the court. The tail of form should not be permitted to wag the dog of substance. In the circumstances here, there is no necessity of doing the vain thing of proceeding further to determine whether the "cramdown" provisions of the statute should be employed. One who buys railroad securities is charged with knowledge that his rights of property are subject to the lien of the "public interest", and therefore subject to be modified when necessary to effectuate that interest, but except for this an owner of railroad securities is entitled to hold* and enjoy the incidents of ownership in the same way as is the owner of any other class of property. In this case, it has not been made to appear that the public interest requires the obliteration of private rights.

The trial court properly refused to approve the plan. The matter should have been returned to the Interstate Commerce Commission for the formulation of a fair and lawful plan which would protect both public and private interests.

A True copy:
Teste:

JOHN A. FEEHAN, JR., Clerk
By CLARA R. JAMES, Deputy
Clerk of the United States Court of
Appeals for the Fifth Circuit.

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 536

In the Matter

of

FLORIDA EAST COAST RAILWAY COMPANY,
Debtor,

ST. JOE PAPER COMPANY, a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, J. BRYSON AIRD and BANK OF THE MANHATTAN COMPANY as Successor Mortgage Trustees, RAILWAY LABOR EXECUTIVES' ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, and SOUTHERN RAILWAY SYSTEM AND AFFILIATED LINES,
Petitioners,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI

On April 5, 1954 this Court decided in the negative the question "whether the Interstate Commerce Commission has the power under § 77 of the Bankruptcy Act to submit

a plan of reorganization to a District Court whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor". 347 U. S. 298, 299. Reversing a judgment of the Court of Appeals for the Fifth Circuit which had directed the approval of a Plan under which the Debtor's properties would be vested in the respondent, Atlantic Coast Line Railroad Company, by a merger, consolidation or a transfer of assets, this Court directed that the case be "remanded to the District Court for further proceedings in accordance with this [Court's] opinion". 347 U. S. p. 315.

The respondent, Atlantic Coast Line Railroad Company, filed a petition for a rehearing, which was denied. 347 U. S. 980.

Immediately on the remand the Atlantic Coast Line made a motion in the District Court for approval of the Plan on the ground that it had been consented to by the Debtor, Florida East Coast Railway Company, and had been "initiated" by the Debtor to the extent that initiation could be deemed to be required under this Court's opinion of April 5, 1954. The notice of motion stated that the Atlantic Coast Line would offer evidence in support of its motion and at a hearing held on June 21, 1954 it did so.

At the same hearing held on June 21, 1954 the Court considered, on its own motion, a question which the Court stated as follows:

> "Under the Mandate of the Supreme Court of the United States filed herein on May 27, 1954, and Judgment of the Court of Appeals for the Fifth Circuit dated January 19, 1953, what courses are open to this Court to complete the reorganization of Florida East Coast Railway Company, and what course do you consider most beneficial to the Debtor's estate and to the Creditors?"

On June 28, 1954, without any further hearing, the Court issued an opinion and entered an order whereby

(1) the Atlantic Coast Line Railroad Company's motion for approval of the Plan was denied; and

(2) it was directed that the § 77 proceedings be dismissed and that the assets of the Debtor's estate be turned over to an Equity Receiver.

The Atlantic Coast Line Railroad Company appealed and obtained a supersedeas. After argument the Court of Appeals for the Fifth Circuit held on November 5, 1954 that

(1) under the decision of this Court the District Judge had no alternative but to disapprove the Plan, since this Court had declared the Plan illegal; but

(2) the District Court erred in dismissing the § 77 proceedings and returning the estate of the Debtor to the Equity Receivership.

The petitioners were successful in defeating Atlantic Coast Line's motion for the approval of the Plan. They were unsuccessful in their attempt to sustain the dismissal of the § 77 proceedings.

While one might have expected the petition for certiorari to be limited to the Court of Appeals' reversal of the District Court's dismissal of the § 77 proceedings, only one of the five Questions Presented relates to that subject (p. 3), and the petitioners make no effort to show that that Question is of a kind to which Rule 19 of the Rules of this Court would apply. The contention that the Court should grant certiorari to review the dismissal of the § 77 proceedings on the ground that no party in interest asked to have the District Court return the proceedings to the Interstate Commerce Commission is planly frivolous (see below, at pages 34-46). Indeed, the matter of the dismissal of the § 77 proceedings is not even mentioned in the petitioners' Conclusion (p. 21-22), in which they summarize the grounds on which they rely in asking that certiorari be granted.

Since the petitioners succeeded in defeating the Atlantic Coast Line's motion for the approval of the Plan, the questions arise: What ground have they for certiorari? Why do they seek a writ? A careful reading of the petition will give the answer to the second question. As we show later in the Argument (p. 46-70), they seek a reconsideration of this Court's decision of April 5, 1954.

Perhaps the proper course would be for the respondent simply to say that the time for the petitioners to file a petition for a rehearing of this Court's decision of April 5, 1954 has long since expired. However, the petition contains many assertions which, if accepted at their face by this Court, might give the most mistaken impressions. Moreover, the Argument in the petition does not clearly and fairly state the issues with which it purports to deal. To avoid that very "confusion" to which the petitioners refer (p. 22), we think it fitting to discuss the petitioners' Questions Presented, Statement of the Case and Argument in considerable detail, even at the risk of laboring the obvious.

Opinions Below.

The opinion of the District Court (VII, 127*) has not been reported.

The opinion of the Court of Appeals (VII, 380-394) has been reported: *Atlantic Coast Line Railroad Company* v. *St. Joe Paper Company*, 216 F. 2d 832.

Questions Presented.

The petitioners list five questions presented (p. 2-4). Four of the questions presented are "loaded". The

* In this and similar citations, the Roman numeral indicates the Volume of the Record and the Arabic numeral designates the page.

fifth relates to a paragraph in Judge HOLMES' concurring opinion.

I. The third sentence of this question states:[1]

> "The directions now given by the Court of Appeals to the court below to proceed in accordance with its own opinion would result in effectually circumventing this Court's opinion and mandate."

The direction given by the Court of Appeals to the District Court is to "take such further action as may not be inconsistent with the opinion of the Supreme Court and [the Court of Appeals'] opinion" (VII, 389, 395). The Court of Appeals manifestly had no intention of "circumventing this Court's opinion and mandate." Its first and overriding direction to the District Court was to take action not inconsistent with the opinion of this Court.

The last sentence of Question I states (p. 2-3):

> "Essentially, the first question presented is whether the Court of Appeals rather than this Court may decide whether this Court's mandate has been obeyed."

That is not a fair statement of the first question which the petitioners argue (p. 13). It omits completely any reference to the following:

(1) The Court of Appeals held that (VII, 388-389)

> "Under the decision of the Supreme Court, the District Judge had no alternative but to disapprove the plan."

In so holding the District Court accepted the petitioners' construction of this Court's mandate.

---

[1] We pass by, without acknowledging concurrence with, the second sentence, which states that this Court decided that the Plan "had a congenital defect, beyond remedy". The words "congenital defect" are taken from this Court's opinion. 347 U. S. p. 314. The words "beyond remedy" are not.

(2) The Court of Appeals also held (VII, 389)

> "[The District Judge] erred in dismissing the Section 77 proceeding and returning the affairs of the debtor to the equity receivership."

This holding did not involve a decision of "whether this Court's order has been obeyed." The Court's mandate did not relate, in the remotest degree, to the dismissal of the § 77 proceedings (see below, p. 29-34).

II. This question relates to an alleged *holding* of the Court of Appeals that the "worthless stock of Florida East Coast Railway Company has acquired value" (p. 14-18). It is the question on which the petitioners make the most extensive argument.

As we show later (p. 67-69), the Court of Appeals made no *holding* that the stock had acquired value. It merely made a comment, based on its interpretation of this Court's opinion of April 5, 1954.

The second sentence reads:

> "• • • the Court of Appeals has now adopted the remarkable contention of the Atlantic Coast Line that this Court by its opinion of April 5, 1954 created some value for that stock."

This constitutes an attempt to tie together the testimony given by the President of Atlantic Coast Line Railroad Company, on cross-examination by Judge STRUM in the District Court at the hearing on June 21, 1954, with a comment in the *per curiam* opinion of the Court of Appeals. There is no relationship between the two (see below, p. 67-68).

The third sentence reads:

> "It is clear from the record that the Atlantic Coast Line now is attempting to use the Debtor's sole shareholder as its cat's-paw."

The "Debtor's sole shareholder" is William R. Kenan, Jr., the sole Trustee of the Mary Flagler Bingham Trust. More than ten years ago he decided that the best interests of the Trust would be served by having the Atlantic Coast Line operate the Debtor's railroad (VII, 110-111; Atlantic Coast Line Exhibit No. 6). He has therefore collaborated with the Atlantic Coast Line and has not been willing to use his "veto power"* to block a "merger plan". The petitioners, disappointed to find that such is the case, call him a "cat's-paw"— a tool or a dupe—without the slightest possible justification in the record (or outside of it).

The next three sentences read:

> "The contention that the stock has now been endowed with a newly-created value is based upon a footnote to this Court's opinion, which obviously has been misconstrued. Accordingly, the second question presented is whether such erroneous 'interpretation' of that footnote is to be allowed to stand. The decision of this question is of the utmost importance in all future proceedings herein."

Here we come to the heart of the petition. What the petitioners mean is that they would like to have this Court take the case again and give to footnote 12 of this Court's opinion of April 5, 1954 an "interpretation" which does violence to the text of the footnote and is completely different from the meaning accepted as correct by both sides in the District Court and the Court of Appeals and similarly accepted as correct by both Courts (see below, p. 62-67). The statement that footnote 12 "obviously has been misconstrued" is disingenuous in the extreme. The implication that the Court of Appeals is guilty of an erroneous "interpretation" of the footnote is equally disingenuous, because the Court of Appeals' "interpretation" was the same as that of the petitioners, of the respondent and of the District Court.

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* 347 U. S. p. 328, Mr. Justice DOUGLAS dissenting.

III. The statement of this question implies that, since no party in interest asked the District Court to return the § 77 proceedings to the Interstate Commerce Commission, the question is presented "whether the Court of Appeals reversal was not in direct conflict with the requirements of Section 77(e)."

The statement of the question said to be presented fails to disclose that (see p. 34-46 below):

(1) At the hearing on June 21, 1954 counsel for the petitioners urged that the Court should dismiss in its discretion, on the ground of unreasonable delay and on the theory that the Plan certified by the Commission in 1951 constituted a recommendation of the Commission for the purposes of § 77(g) in 1954.

(2) At the hearing on June 21, 1954 there was only one passing reference to subsection (e). That was a statement by counsel for the petitioners that the Court could dismiss the § 77 proceedings in its discretion under § 77(e) if there had been undue delay.

(3) There was no contention that a dismissal was mandatory under § 77(e).

(4) The Atlantic Coast Line is a party in interest. On June 21, 1954, it was made perfectly clear that the Atlantic Coast Line wished a return to the Commission rather than a dismissal of the § 77 proceedings and that as a party in interest it would make a motion for a reference back to the Commission if and when any such motion was in order.

(5) The Atlantic Coast Line's motion for approval of the Plan was not disposed of at the hearing on June 21, 1954, and the District Court indicated that there would be a further hearing. It would have been manifestly out of order for the Atlantic Coast Line to move for a reference back to the Commission while its motion for approval of the Plan was pending undetermined.

(6) The Court did not dismiss the proceedings under

§ 77(e) on the ground that the dismissal was mandatory because there was no motion for reference back to the Commission. It dismissed the proceedings on the ground that there was undue delay.

IV. The petitioners say that "the question is presented whether the Court of Appeals may now say that its previous decision has not been overthrown, made void, undone or annulled" (p. 3-4). They also complain about a statement in Judge HOLMES' concurring opinion (VII, 390).

The question fails to state that

(1) This Court's grant of certiorari was limited. 345 U. S. 948.

(2) This Court did not decide, or even consider in any way, any of the issues on which the *per curiam* opinion of the Court of Appeals (VII, 390) and Judge HOLMES' concurring opinion (VII, 390) indicated that the Court of Appeals' previous decision still stands.

Statement of the Case.

We disagree with much that is said in the petitioners' statement of the case.

The equity receivership.

On August 31, 1931 a consent receivership of Florida East Coast Railway Company was begun (I, 127).

For nine and one-half years the Railway Company was in the equity receivership and, as the petitioners state (p. 6), "little progress was made". The petitioners say that the lack of progress in equity receivership was due "largely because of insufficient earnings" (p. 6). They do not support this assertion by any reference to anything in the record, and the record shows that the Railway Company had income available for fixed charges in the years 1938-1941 as follows:[2]

[2] 261 I. C. C. p. 159, in Vol. IV of the record.

Period	*Income available for fixed charges*
Year 1938	$ 941,996
Year 1939	1,360,068
Year 1940	959,099
Year 1941	1,601,964
1938-1941 average	1,215,782

In the twelve months ended November 30, 1954 the Railway Company had income available for fixed charges of $745,568[3] as compared with the 1938-1941 annual average of $1,215,782.

With the most recent earnings thus at a level much lower than the average for the years 1938-1941, in which the petitioners say nothing was accomplished in the equity receivership "largely because of insufficient earnings", the petitioners now wish to return to the equity receivership.

The institution of the § 77 proceedings and developments prior to October 25, 1951.

On January 25, 1941, reorganization proceedings were instituted under § 77 of the Bankruptcy Act (VI, 529). The petitioners purport to give the reason for the commencement of the § 77 proceedings in lieu of the equity receivership (p. 6). But they do not refer to anything in the record to support what they say, and we know of no support for it.

During the period from the institution of the § 77 proceedings on January 25, 1941, until October 25, 1951, there were many developments in the proceedings which we have previously detailed to this Court.[4] Only one need be mentioned.

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[3] This figure is taken from reports filed by the Trustee of the Railway Company with the Interstate Commerce Commission. For the use of similar data filed with the Interstate Commerce Commission, see the second paragraph of footnote 12 in this Court's opinion of April 5, 1954 herein (347 U. S. p. 309).

[4] See brief of respondent, Atlantic Coast Line Railroad Company, dated October 6, 1953, in No. 24, October Term, 1953, p. 26-39.

On July 12, 1951, the Commission handed down its Fifth Supplemental Report (282 I. C. C. 81-191).[5] Referring to that Report, the petitioners say that (p. 7) "The Commission has formally declared that these 5% bondholders are 'prior to the reorganization of the debtor, the *equitable owners'* of the Debtor's property (282 I. C. C. 81 at p. 186)." This is a clipped quotation; the petitioners italicize the words "equitable owners" and then do not quote the Commission's statement as to what the bondholders are equitable owners of. The Commission did not say that the 5% bondholders are the equitable owners of the Debtor's property. The Commission said that the bondholders are the "equitable owners of the assets mortgaged to secure the bonds", and in the same Report the Commission found that there are unmortgaged assets having a value of $1,177,356 (282 I. C. C. 176, 180).

The Plan of October 25, 1951.

On October 25, 1951 the Commission approved a Plan for reorganization of Florida East Coast Railway Company under which all of its assets would become vested in the Atlantic Coast Line Railroad Company by (1) a merger, (2) a consolidation or (3) a transfer and conveyance by the Debtor's Trustees.[6]

The Plan of October 25, 1951, sometimes referred to herein simply as "the Plan", has been the subject of all decisions since October 25, 1951, including this Court's decision of April 5, 1954. The Plan was certified to the District Court on November 7, 1951.

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[5] Printed at the beginning of Volume I of the Record.

[6] The Commission's Sixth Supplemental Report, dated October 25, 1951, modified a plan which the Commission had approved in its Fifth Supplemental Report of July 12, 1951 (282 I. C. C. 195-212). The text of the Plan itself immediately follows the Sixth Supplemental Report at the beginning of Volume I of the Record (282 I. C. C. 213). Section II, "TRANSFER OF THE DEBTOR'S PROPERTIES TO ATLANTIC COAST LINE RAILROAD COMPANY", is at 282 I. C. C. p. 213.

The so-called Bondholders' Agreement: the development of the Alternative Equity Plan and the program for a dismissal of the § 77 proceedings.

Between the date of the certification of the Plan to the District Court and the hearings in that Court certain of the parties joined in a so-called "Bondholders' Agreement",[7] by which they became obligated (I, 25-39)

(1) to oppose the Plan and to support a dismissal of the § 77 proceedings and a turn-over of the Debtor's assets to the moribund equity receivership, and

(2) to approve a new plan referred to herein as the Alternative Equity Plan.

Since that time all of the petitioners herein and in Nos. 544 and 552 have continuously supported this program and in their present petitions they merely continue their fight to escape the safeguards which § 77 has provided and to put into effect the Alternative Equity Plan.

Yet that plan is indefensible—so plainly indefensible that for years its proponents followed the tactic of not referring to the criticisms of its gross faults.[8] *Now the petitioners*

---

[7] All of the petitioners in Nos. 536, 544 and 552 became parties to the Bondholders' Agreement except Railway Labor Executives' Association, Seaboard Air Line Railroad Company and Southern Railway System. The latter, not being bondholders, did not become parties to the Bondholders' Agreement but have been working in conjunction with the parties to the Agreement.

[8] Typical of the references to the Alternative Equity Plan are those in the brief on behalf of the petitioners in this Court in No. 24, October Term, 1953 (p. 32):

> "Three-fourths of the 5% bondholders (the equitable owners of the property) have made an agreement (R. Vol. I, pp. 28 to 39) for reorganization through foreclosure sale, and are prepared to go through with it. By that agreement all 5% bondholders, other than the St. Joe Paper Company, are given the option to receive first mortgage bonds or stock or both in the company organized to take over the property.
>
> "The St. Joe Paper Company has a right to receive only stock in exchange for its 5% bonds (R. Vol. I, p. 35) and a voting trust of the stock of the new company is to be established for five years, with three trustees, only one of which is to be named by the St. Joe Paper Company."

have apparently concluded that it is better not to refer to the Alternative Equity Plan at all, but instead to give bland assurances about what can be done in equity without mentioning that all of the parties to the Bondholders' Agreement are bound to cooperate vigorously "in urging, prosecuting, accepting and consummating" the indefensible Alternative Equity Plan (I, 26).

Why do we refer to the Alternative Equity Plan as indefensible? There are five reasons:

First: The Alternative Equity Plan contemplates that the reorganized Florida East Coast Railway Company would be controlled by the St. Joe Paper Company. The Interstate Commerce Commission has explicitly found that such control by the St. Joe Paper Company would be contrary to the public interest.[9]

Second: The Alternative Equity Plan provides for a fixed interest debt and fixed interest charges much larger than an internally reorganized Florida East Coast Railway Company should be allowed to have or the Commission would permit. There would be an initial issue of $20,000,000 of new 4% Mortgage Series A Bonds, the amount of which could be increased for various purposes; the present First Mortgage Bonds would not be discharged; and there would be equipment obligations.[10] The debt would thus be an unspecified amount considerably in excess of $20,000,000 and the fixed charges would be well in excess of $800,000 a year.

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[9] See 282 I. C. C., p. 187, in Vol. I of the record.

[10] The provision with respect to the new Mortgage Series A Bonds will be found in Volume I at pages 30-32.

Since the First Mortgage Bonds are not callable, they could not be discharged under the Alternative Equity Plan as they could be by § 77 plan. Consequently they would be kept alive until their maturity in 1959. Under the Alternative Equity Plan an amount of cash or United States Government obligations equal to the principal amount of the First Mortgage Bonds would be set aside (I, 33). The annual fixed charges of the reorganized company would include 4½% of the amount of the First Mortgage Bonds, which is $8,189,000; any interest received on the United States Government obligations would be a partial offset.

The Commission expressly found that if there were an "internal plan" not more than $13,500,000 of 4% fixed interest bonds should be issued, with annual interest of $540,000.[11]

As we have shown (p. 10), the balance available for fixed charges in the most recent twelve months period was only $745,568.

The Alternative Equity Plan would mean a rash ride toward another bankruptcy, despite the fact that the Florida East Coast Railway Company has already been in the hands of the Court for over 23 years.

Third: A third objection, which has the closest possible relationship to the first and second, is the provision whereby the St. Joe Paper Company, an operating-holding company controlled by the duPont Trust, has agreed to exchange its holding of $23,259,000 of First and Refunding Mortgage Bonds (more than 50%) for new stock of the reorganized company on the basis of 10 shares of new stock for $1,000 principal amount of Bonds while permitting the other bondholders to obtain $1,000 principal amount of new bonds for each $1,000 principal amount of First and Refunding Mortgage Bonds exchanged under the plan.[12] This feature of the Alternative Equity Plan is without precedent in any reorganization plan ever consummated, so far as we know. The duPont Trust is predominantly a charitable trust and it controls the St. Joe Paper Company. The expert evidence established and the Commission found that the new stock would not sell for more than 25, whereas the new bonds could be expected to sell for 100.[13]

In effect, the St. Joe Paper Company and the duPont Trustees have agreed to a subordination of the Bonds held

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[11] 282 I. C. C., p. 158, in Vol. I of the record.

[12] The duPont Trust itself owns $1,741,000 of the Bonds. The record is not entirely clear whether the Trust would be limited to stock like the St. Joe Paper Company; the plan itself refers only to the St. Joe Paper Company (I, 34).

[13] 282 I. C. C., p. 157, at the beginning of Vol. I of the record.

by the St. Joe Paper Company (and perhaps of those held by the duPont Trust) in favor of the other bondholders. Either this agreement for a subordination involves a gross violation of the fiduciary responsibilities of the duPont Trustees and of the Directors of the St. Joe Paper Company or there is some undisclosed expectation that the St. Joe Paper Company and the duPont Trust will profit at the expense of the public interest if the Alternative Equity Plan becomes effective.

The subordination provision represents the price which the St. Joe Paper Company (and the duPont Trustees) are willing to pay for control. Thus there is the closest possible connection between the *Third* fault in the plan and the *First.*

The subordination provision runs in favor of the holders of $20,000,000 of Bonds who would be entitled to receive $20,000,000 of new bonds. That is the explanation of the proposal for $20,000,000 of new First Mortgage Series A Bonds in the teeth of the Commission's finding that there should not be more than $13,500,000. Thus there is the closest possible connection between the *Third* fault in the Alternative Equity Plan and the *Second.*

The *First, Second* and *Third* defects in the plan are all interdependent. The same thing is true, perhaps to a lesser degree, of the Fourth.

Fourth: As an added inducement to the bondholders who have petitions before this Court in Nos. 544 and 552, the Alternative Equity Plan provides that directors of the reorganized company shall be designated by such petitioner-bondholders as follows:

Petitioner-Bondholders	*Number of Petition in this Court*	*Number of Directors*
F. K. Conn	544	1
Welbon (Claughton) Group	544	1
S. A. Lynch Corporation	552	2

Thus the St. Joe Paper Company and the duPont Trustees have promised all of the petitioner-bondholders (or their leaders) that, if they will support the Alternative Equity Plan, they can sit on the Board of Directors of the reorganized Florida East Coast Railway Company.[14]

One of the especially striking things about this compact is that the petitioner-bondholders, who have thus been promised Directorships, would undoubtedly hold only a few shares of stock.[15]

Fifth: The fifth defect of the plan relates to a reserve for passenger stations, particularly a passenger station at Miami. The Alternative Equity Plan contains no provision for any such reserve. In every Report which the Commission has issued in the past ten years it found that the plan of reorganization should provide for such a reserve, and the Plan certified on November 7, 1951 provides for a reserve of $3,000,000.[16]

In one sense the Alternative Equity Plan is not before this Court—this Court is not called upon to approve it or disapprove it. In another sense it is very much before the Court and the Court will doubtless appreciate the significance of the petitioners' failure even to mention it.

In the argument which counsel for the petitioners made

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[14] F. K. Conn heads a group of eight bondholders for whom he has been spokesman and of whom one is Mrs. Conn. At the hearing on February 4, 1952 counsel for Mr. Conn said that the Conn Group held $978,000 principal amount of the Bonds. In January, 1949 Conn had testified that he and Mrs. Conn held a total of $598,500 between them (V, 381-382).

[15] As we have indicated in discussing the subordination agreement in the alternative Equity Plan, it would be to the advantage of Conn and his associates, the Welbon (Claughton) Group and S. A. Lynch Corporation to take new bonds rather than stock under the Alternative Equity Plan. However, under that plan they would have a right to be directors so long as they held *any* certificates representing stock (I, 37). What any of the petitioner-bondholders could do would be to turn in all present Bonds except one for new bonds and turn in one present Bond for 10 shares of stock.

[16] See 282 I. C. C. at p. 169-173, 214, in Vol. I of the record.

in the District Court on June 21, 1954 in favor of a dismissal of the § 77 proceedings he stressed the importance of the Alternative Equity Plan (VII, 51; see below, p. 37, footnote 29). *And the District Court's opinion dismissing the proceedings contains two favorable references to the Alternative Equity Plan, distinctly implying that, after the dismissal of the § 77 proceedings and the turnover to the Equity Receiver, the Alternative Equity Plan would be speedily put into effect* (VII, 129-132; see below, p. 41-42).

A realistic consideration of the present status of these proceedings, of the future of the reorganization and of its history since the latter part of 1951 would have to be based on a recognition that the indefensible Alternative Equity Plan is the platform and program of the petitioners herein and in Nos. 544 and 552.

Judge Strum's disapproval of the Plan and his dismissal of the § 77 proceedings on March 11, 1952.

On March 11, 1952 the Honorable Louie W. Strum, late Circuit Judge, holding the District Court pursuant to Designation under § 18 of the Judicial Code, 28 U. S. C. A. § 291, issued an opinion and order.

In the order Judge Strum (I, 167-168)

(1) found that the Plan "is neither fair nor equitable and that it does not afford due recognition to the rights of the 5% bondholders, particularly the minority groups" and on that ground disapproved the Plan;

(2) found that there had been "undue delay in the reasonably expeditious reorganization of the debtor";

(3) dismissed the § 77 proceedings effective June 1, 1952;

(4) stated that appropriate orders would be entered in the equity receivership of the Florida East Coast Railway Company—which preceded the § 77 proceedings and has never been formally terminated—to effect a re-

organization through a foreclosure of the First and Refunding Mortgage of the Florida East Coast Railway Company; and

(5) directed Scott M. Loftin and John W. Martin, as Trustees of the property of the Debtor in the § 77 proceedings, to turn over the property and records of the Debtor on June 1, 1952 to themselves as Receivers in the equity receivership.

In the opinion (103 F. Supp. 827-847; I, 127-168) Judge STRUM

(1) said that the holders of the First and Refunding Mortgage Bonds "own the equity in the property" and to "deprive them of the equitable ownership of this property * * * is intrinsically unfair and inequitable" (p. 142);

(2) advanced eleven separately numbered additional reasons why he considered the Plan "unfair and inequitable" (p. 143-157);

(3) concluded that "the Commission's findings as to public interest are wholly unsupported by evidence" (p. 157-164); and

(4) said that the holders of 75.5% of the First and Refunding Mortgage Bonds, plus an additional 23.5% represented by the Trustee for the Bonds, opposed "the Commission's fourth plan" but "will be able to agree upon a plan of their own which will assure a prompt reorganization of the debtor in equity through a foreclosure and sale under the 5% mortgage" (p. 166).

The bondholder opposition to the Plan and support of the Alternative Equity Plan; the unrepresented bondholders.

The opposition of the Bank of the Manhattan Company and Mr. Aird as Successor Mortgage Trustees.

The petitioners speak repeatedly of "the 5% bondholders" as if they represented all of the bondholders

and as if counsel who made the arguments in the District Court and the Court of Appeals has been counsel for all of "the 5% bondholders" (p. 8, 9, 10). That is not the case.

As we have previously demonstrated to this Court, the absolute maximum percentage in amount of the holders of the First and Refunding Mortgage Bonds ("the 5% bonds") which can be regarded as opposed to the Plan and as favoring the Alternative Equity Plan is 75.51%.[17] *There are many hundreds of bondholders, holding more than $11,000,000 of bonds, who are entitled to the protection of the Commission and the Courts and who have not evidenced any desire to align themselves with the little group which has opposed the Plan and is sponsoring the Alternative Equity Plan.*

The Successor Trustees of the First and Refunding Mortgage, Bank of the Manhattan Company and J. Bryson Aird (who is a Vice President of the Bank), are also aligned with St. Joe Paper Company and the duPont Trustees and are petitioners in this cause. However, they have no power to accept or reject a § 77 plan for the bondholders and the record establishes that they cannot be considered in any sense representative of the hundreds of holders of $11,000,000 of Bonds who are unrepresented. They were appointed by the St. Joe Paper Company[18] and Mr. Aird has acknowledged that the position of the Trustees is for all practical purposes determined by that of the holder of a large majority in amount of the Bonds (V, 379).

The petitioners say (p. 8):

> "In 1952, the representatives of 75% of the outstanding 5% bonds filed written motions to that

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[17] See brief of the respondent, Atlantic Coast Line Railroad Company, in No. 36, October Term, 1953, at pages 6-9 and brief of the respondent, Atlantic Coast Line Railroad Company, in No. 24, October Term, 1953, at pages 43-44.

[18] The appointment of the Mortgage Trustees by the St. Joe Paper Company is recited in Document 728 (Printed Court Record, Vol. 6, p. 47-48), which is part of the unprinted record (I, 207).

> effect and a similar motion was filed by the mortgage trustees acting for the holders of 24% of the outstanding bonds, not otherwise represented in these proceedings (R. Vol. I, pp. 1, 21-23, 125-6, 166-7, 169), * * *."

We do not find in the record any motion "filed by the mortgage trustees acting for the holders of 24% of the outstanding bonds". We do find a motion filed by the Mortgage Trustees and at two of the cited places in the record (I, 166-167, 169) there are findings by Judge STRUM that the Mortgage Trustees were acting for the holders of the 24%. However, as we note later, each and every one of Judge STRUM's findings was set aside by the Court of Appeals, and it would be a travesty to treat the Bank of the Manhattan Company and Mr. Aird as representatives of the 24%. They have been acting as the 75% have told them to act, and if they were treated as representatives of the 24%, the 24% would be simply disfranchised.

The decision of the Court of Appeals on January 19, 1953.

The Atlantic Coast Line appealed from Judge STRUM's order of March 11, 1952.

The appeal was argued on October 18, 1952 before the Court of Appeals for the Fifth Circuit sitting *en banc* (II, 716-717).

The Court of Appeals reversed the District Court and remanded the case to the District Court with directions to approve the Plan (II, 716-734; 201 F. 2d 325).

In so doing the Court of Appeals found (II, 729-730; 201 F. 2d, p. 330):

> "* * * that the findings of the trial judge, rejecting the commission's findings as to the public interest and as to valuation, and declaring that the plan is unfair and inequitable, are themselves without support in law or in fact; and that his judgment refusing to approve the plan and dismissing the reorganization proceedings may not stand."

More specifically, the Court found that

(1) there is "abundant evidence" to support the Commission's public interest findings (II, 727; 201 F. 2d 329);

(2) the Plan is fair and equitable, if not distinctly liberal, to the bondholders;[19]

(3) the reason for the opposition to the Plan is the desire of the bondholder-opponents to control the Florida East Coast;[20] and

(4) there had not been "an unnecessary delay in the reasonably expeditious reorganization of the debtor" (II, 724-731; 201 F. 2d p. 328-331; VII, 380).

Chief Judge HUTCHESON and Judges HOLMES and RIVES concurred in the Court's decision. Judges BORAH and RUSSELL dissented on the ground, stated in Judge RUSSELL's dissenting opinion, that (II, 732; 201 F. 2d p. 331):

> "The bald proposition established by the majority opinion is that the court's power in bankruptcy authorizes the taking, against the wishes of the overwhelming majority of the refunding bondholders, of their existing rights, requiring acceptance by them of an entirely different and unrelated security which they do not desire."

The petitions for certiorari and this Court's grant of a limited writ.

Four petitions of certiorari were filed with this Court (VII, 28, 36-39). All four posed questions, which were variously stated, as to the legality of a "forced merger". All four asked this Court to review the Court of Appeals' reserval of the District Court's findings. None of the four

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[19] For the discussion of this point in the opinion see the brief of the respondent, Atlantic Coast Line Railroad Company, in No. 24, October Term, 1953, at pages 45-47.

[20] See brief of the respondent, Atlantic Coast Line Railroad Company, in No. 24, October Term, 1953, at pages 46-47.

asked this Court to reinstate the District Court's dismissal of the § 77 proceedings.

This Court granted certiorari limited to a single question, which had been presented by one of the four petitions. 345 U. S. 948. That question involved the legality of a "forced merger". We refer later to the meaning of the words "forced merger".

This Court's decision of April 5, 1954.

On April 5, 1954 this Court handed down a 4-3 opinion reversing the Court of Appeals. 347 U. S. 298.

The Court's opinion started by stating "the sole question for decision" as follows (p. 299):

> "The sole question for decision in this case is whether the Interstate Commerce Commission has the power under § 77 of the Bankruptcy Act to submit a plan of reorganization to a district court whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor."

The Court answered this question in the negative.

The portions of the opinion which were later considered dispositive by the Court of Appeals (V, 386-388) were three sentences in the text at page 308 and the second paragraph of footnote 12. The sentences read (italics supplied):

> "All this of course is not to say that mergers cannot be carried out in the course of a § 77 reorganization. It merely means that if they are, they must be consummated in accordance with all the requirements and restrictions applicable to mergers under the Act primarily concerned with railroad amalgamations, the Interstate Commerce Act. So far as here revelant, that means that the merger must be worked out and put before the Commission *by the merging carriers.*[12]"

The second paragraph of footnote 12 reads:

> "In this connection it is important to remember that a railroad in § 77 proceedings is not a defunct organism but remains a live and going concern. See the references throughout § 77 to 'the debtor' as an active entity; also *Van Schaick* v. *McCarthy*, 116 F. 2d 987, 992-993. During the entire period that the Florida East Coast has been in receivership or trusteeship there have been annual stockholders' meetings at which a Board of Directors was elected. See the Florida East Coast's Annual Reports on file with the Interstate Commerce Commission. Indeed the desire to provide a ready remedy for the overhauling of a railroad's financial structure without impairing its primary responsibilities as a regularly functioning carrier was one of the principal reasons for the enactment of § 77. See 5 Collier, Bankruptcy, § 77.02. Thus it follows from the consistency clause, when viewed in the light of this corporate continuity of a railroad in reorganization, that those who in the absence of § 77 would wield the corporate merger powers must initiate and work out the merger now. Cf. § 77 (d), which not only permits but requires the debtor railroad itself to file a plan of reorganization ('the debtor . . . shall file a plan'; certain other interested parties 'may' also file a plan)."

The same part of footnote 12 was interpreted by the minority of this Court as setting forth this Court's holding explicitly. 347 U. S. 328-330.

The meaning of the decision of April 5, 1954 is considered later in more detail at pages 46-70 in the Argument herein.

The Atlantic Coast Line Railroad Company's petition for a rehearing and its denial.

On April 19, 1954 the Atlantic Coast Line Railroad Company filed a petition in this Court for a rehearing, which

was denied on May 24, 1954. 347 U. S. 980. Mr. Justice DOUGLAS wrote a memorandum to which we refer in detail in the conditional cross-petition which we are filing.

In the conditional cross-petition we also point out that the present petitioners say, or imply most distinctly, not once but three times, (p. 7, 8, 15), that the Atlantic Coast Line undertook to introduce evidence in this Court and that this Court rejected the offer of evidence. There is no basis for these assertions.

The mandate of this Court.

The mandate of this Court recites the judgment of the Court of Appeals, dated January 19, 1953, the granting of the writs of certiorari and the argument, and then directs that the judgment of the Court of Appeals "be, and the same is hereby, reversed with costs" and that (VII, 21-23)

> "• • • this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of Florida for further proceedings in accordance with the opinion of this Court."

The motion of the Atlantic Coast Line Railroad Company; the order of the District Court providing for a hearing on the remand; and the hearing on June 21, 1954.

Immediately upon the issuance of the mandate of the Supreme Court the Atlantic Coast Line Railroad Company made the motion which we have summarized above at page 2.

On June 9, 1954, by the direction of the District Judge, the parties were notified that there would be a hearing on June 21, 1954 at which the Court would hear arguments on the following matters (VII, 40-41):[21]

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[21] Items 2, 3 and 4 were not involved on the appeal to the Court of Appeals.

"1. Under the Mandate of the Supreme Court of the United States filed herein on May 27, 1954, and Judgment of the Court of Appeals for the Fifth Circuit dated January 19, 1953, what courses are open to this Court to complete the reorganization of Florida East Coast Railway Company, and what course do you consider most beneficial to the Debtor's estate and to the Creditors?

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"5. Motion of Atlantic Coast Line Railroad Company, filed May 26, 1954, for entry of order confirming certain action of Court of Appeals, and approving Interstate Commerce Commission plan of reorganization dated October 25, 1951."

The evidence introduced by the Atlantic Coast Line.

The Atlantic Coast Line introduced considerable evidence at the hearing on June 21, 1954. The petitioners purport to summarize this evidence (p. 8) but their summary is so glaringly incomplete as to convey a wholly incorrect impression as to what the evidence was. The same thing is true of Judge STRUM's opinion (VII, 129-130). However, an explanation of the scope of the evidence is more pertinent to the Atlantic Coast Line's conditional cross-petition, in which we are setting forth the evidence in detail.

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The purpose of the evidence was to show not merely that the Debtor, Florida East Coast Railway Company, and its sole stockholder had *consented* to the Plan but also to show that the Florida East Coast Railway Company had "*initiated*" the Plan to the extent that "initiation" might be required under this Court's opinion of April 5, 1954.

The testimony of the President of the Atlantic Coast Line.

The petitioners refer to answers given by the President of the Atlantic Coast Line to questions put on cross-examination by Judge STRUM (p. 3, 8). This subject is referred to later (p. 67-68) in our answer to the petitioners' argument (p. 14-18) that the "Court of Appeals erred in holding that the worthless stock has acquired value".

The alleged motion by "the 5% bondholders".

The petitioners speak of a motion as having been made at the hearing on June 21, 1954 by "the 5% bondholders" (p. 8-9). As we have shown above at pages 18-20, the motion was made on behalf of a small number of the holders of 75% in amount of the Bonds and on behalf of the other petitioners who are not bondholders. There was no motion on behalf of the other 25%.

The offer of the Atlantic Coast Line to show that the Plan had become progressively more favorable to the Florida East Coast bondholders. The District Court's indication that there would be another hearing.

Counsel for the Atlantic Coast Line offered to show, in support of the Atlantic Coast Line's motion for an order approving the Plan, "that not merely have there been no changes in conditions which have made the plan unfair, but that the trend has been the other way and the plan is, if anything, more fair than it was when previously approved."

The District Court then expressly indicated that there would be "another hearing".

We give the full text of the colloquy in a footnote[22] (VII, 87-88).

The District Court's opinion and order of June 28, 1954.

On June 28, 1954, without any further hearing the District Court entered an order by which it "adhered to and confirmed", with two modifications, the order of March 11, 1952, the provisions of which are summarized above at pages 17-18 (VII, 133). The two modifications involved the date of the turnover to the Equity Receiver and the continuance of John W. Martin as sole Equity Receiver in view of the death of Scott M. Loftin.

With the order the District Court handed down an opinion, the heart of which will be found in the following two paragraphs (VII, 128-129):

> "At the conclusion of its opinion the Supreme Court ruled, without reservation, that the judgment

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[22] "Mr. Bourne: Your Honor, I am prepared also, if pertinent, to show through another witness, that any change of conditions since the plan was before this Court in 1952 and before the Court of Appeals in 1952 and early 1953, have been such as to make the plan more favorable than it was at that time.

"The Court: I don't want to go into the question of whether the plan would be adopted or not. Now, I don't want to go into that. Not whether the plan will or will not be adopted, but the way we should go at it.

"Mr. Bourne: Well, I simply want to make it clear that *I stand ready in support of the motion to approve the plan—for an order approving the plan, to prove that not merely have there been no changes in conditions which have made the plan unfair, but that the trend has been the other way and the plan is, if anything, more fair than it was when previously approved.*

"The Court: We don't have that question before us this morning. *The question here is, what course will be pursued, and the question to reconsider that plan, will be taken up at another hearing.* If there is something else, that may be of no materiality whatsoever.

"Mr. Bourne: I respectfully except to your Honor's ruling.—On that, Your Honor."

of the Court of Appeals is reversed and 'the case is remanded to the District Court for further proceedings in accordance with this opinion'. The effect of that decision and order was to wholly, not partially, nullify the judgment of the Court of Appeals; to completely abrogate the proposed plan of reorganization; and to grant leave to this Court to further proceed in any manner authorized by law and consistent with the Supreme Court's opinion. *The decision renders the plan presently proposed congenitally and irrevocably defective because not initiated by both carriers involved.*

"More than two years ago this Court dismissed this bankruptcy proceedings in the exercise of its discretion under 77(e) and 77(g) of the Bankruptcy Act (11 USCA 205); the latter subsection dealing with unreasonable delay in reorganization. The situation today is even more aggravated. More than two additional years have passed, without progress, and *in the light of present conditions the Court again finds, with added reason, and after having examined the recommendations of the Interstate Commerce Commission, that unreasonable delay has occurred. The plan for an internal reorganization agreed to by the holders of the 5% Refunding Bonds, and filed in the cause, opens the way for a speedy internal reorganization in the equity foreclosure case.*"

The appeal to the Court of Appeals and the decision of that Court.

The Atlantic Coast Line appealed to the Court of Appeals from the order of June 28, 1954 (VII, 134) and filed a supersedeas in an amount fixed by the District Court (VII, 135-137).

The appeal was argued before Judges HOLMES, BORAH and RUSSELL. *It will be recalled that Judges Borah and Russell voted in January, 1953 against the Plan.* See 347 U. S. 298, 302, footnote 4.

As we have said (p. 2-3), on November 5, 1954 the Court

of Appeals issued an opinion and order to the effect that

(1) under the decision of this Court the District Judge had no alternative but to disapprove the Plan, since this Court had declared the Plan illegal; but

(2) the District Court erred in dismissing the § 77 proceedings and returning the estate of the Debtor to the Equity Receivership.

We disagree with much of what is said in the petitioners' Statement of the Case about the opinions in the Court of Appeals. However we indicate our differences, to the extent necessary, in the Argument, and in order to avoid repetition we will not state them here.

ARGUMENT

I.

The Court of Appeals properly denied the petitioners' motion to dismiss the appeal.

It undertook to interpret this Court's mandate to the extent, but only to the extent, necessary to decide the issues which were properly before it.

The District Court's order of June 28, 1954 did two things:

(1) It denied the Atlantic Coast Line's motion for approval of the Plan,[23] and

(2) It "adhered to and confirmed" (with immaterial modifications) the order of March 11, 1952, which directed a dismissal of the § 77 proceedings and a turnover to the Equity Receivers.

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[23] Actually the order (VII, 133) made no reference to the Atlantic Coast Line's motion, but the order and the opinion (VII, 127-132), taken together, effected a denial of the motion and set forth the grounds for the denial.

The petitioners moved to dismiss the appeal from the District Court's order[24] on the ground that the question whether the order was "in obedience to the mandate of the Supreme Court and within its compass, is a question between the Supreme Court, which issued the mandate, and the District Court, to which it was directed, and the Court of Appeals is without jurisdiction to pass on it". The motion was denied (VII, 380).

The petitioners say (p. 10):

> "[The Court of Appeals] does not discuss the motion to dismiss. It merely asserts that its 'appellate jurisdiction in this matter in full and complete' citing Section 2106 of Title 28, U. S. Code (Appendix II, p. 40)."

This statement is palpably incorrect.

The *per curiam* opinion of the Court of Appeals gave the Court's reason for denying the motion (VII, 380):

> "The motion to dismiss should be overruled because this appeal involves entirely new issues, which were not decided or considered by the Supreme Court, and not disposed of by its reasoning or judgment, when this case was before it. 345 U. S. 948."

The Court of Appeals was clearly right. The issues presented by the District Court's dismissal of the § 77 proceedings "were not decided or considered by the Supreme Court, and not disposed of by its reasoning or judgment".

The limited writ of certiorari granted by this Court did not cover the question whether the Court of Appeals had erred in reversing the District Court's dismissal of the § 77 proceedings by the order of March 11, 1952. 345 U. S. 948. Counsel for the petitioners did argue in this Court that the dismissal was justified and did ask that the "judgment of the District Court, including

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[24] The petitioners referred to "the orders of June 28, 1954 (VII, 375), but there was only one order in these proceedings (VII, 133).

the dismissal of the proceedings under Section 77", be affirmed,[25] but counsel for the Atlantic Coast Line objected that any review of the Court of Appeals' action in reversing the dismissal of the proceedings was outside the scope of the writ of certiorari.[26] This Court did not consider the matter of dismissal at all and did not affirm the District Court; it simply remanded the case to the District Court for further proceedings in accordance with this Court's opinion. 347 U. S. 298.

Indeed, at the District Court hearing on June 21, 1954, counsel who spoke for all of the present petitioners[27] expressly disclaimed any contention that this Court's mandate reinstated the dismissal of the § 77 proceedings which had been reversed by the Court of Appeals.[28] Counsel urged a dismissal of the § 77 proceedings on the ground of "unreasonable delay" (VII, 51, 53; see below, p. 37, footnote 29) and the Court dismissed the proceedings on the ground that there had been unreasonable delay (VII, 129; see above p. 17 and below, p. 41-42). Thus there was a new judicial decision, dealing with issues on which this Court had not passed.

Counsel for the petitioners contend that, after the entry of the District Court's order of June 28, 1954, the case should have gone directly to this Court (p. 10, 13, 22).

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[25] See brief on behalf of the petitioners in No. 24, October Term, 1953, at p. 32-33.

[26] See brief of the respondent, Atlantic Coast Line Railroad Company, in No. 24, October Term, 1953, at p. 145-146.

[27] In Nos. 536, 544 and 552.

[28] Counsel said (VII, 52):

> "• • • *There is nothing in the judgment or the opinion of the Court that even deals with the dismissal and the turning over of the road. It never was* argued and never *considered by the Court,* and I cannot make myself believe it is appropriate to say that the Supreme Court intended to reinstate some orders which it never had before it and didn't deal with."

Italics are supplied in this brief unless otherwise indicated.

But there was no procedure by which the Atlantic Coast Line could have taken to this Court, directly from the District Court, the issues presented by the District Court's dismissal of the § 77 proceedings.

In the Court of Appeals counsel for the various appellees argued that a petition to this Court for a writ of mandamus rather than an appeal to the Court of Appeals, was the Atlantic Coast Line's proper remedy. In replying to this argument counsel for the Atlantic Coast Line reviewed many decisions relating to the scope of the writ of mandamus and showed that the Court of Appeals clearly had the power to interpret this Court's mandate to the extent necessary to dispose of all of the issues presented by the appeal. We conceded that, if the issues had involved the interpretation of the mandate *and nothing else*, then the Court of Appeals might have been without jurisdiction. But we pointed out that (1) the issues involved in the dismissal of the § 77 proceedings did not involve the interpretation of this Court's mandate at all and (2) the issues with respect to the approval of the Plan involved the consideration of new evidence as well as the interpretation of the mandate.

We see no need to elaborate on these points or further to defend the Court of Appeals against the petitioners' charges that it "usurped the functions of this Court" (p. 13), except to say that the *per curiam* opinion of the Court of Appeals ends with a paragraph, which was followed in the Court's order (VII, 395) and which reads as follows (VII, 388-389):

> "Under the decision of the Supreme Court the District Judge had no alternative but to disapprove the plan since that court had declared it illegal. However, he erred in dismissing the Section 77 proceeding and returning the affairs of the debtor to the equity receivers. Accordingly, the order appealed from is REVERSED, and the cause remanded to the District Court with directions to take such

> further action as may not be inconsistent with the opinion of the Supreme Court and this opinion."

In the first sentence the Court sustained the petitioners' view. They cannot complain of that.

In the second sentence the Court disposed of issues which had never been before this Court.

In the third sentence the Court directed the District Court to take further action not inconsistent with the opinion of this Court and the opinion of the Court of Appeals.

Certainly the petitioners cannot complain of the direction that the District Court take such further action as may not be inconsistent with the opinion of this Court.

Nor can they complain of the reference to the opinion of the Court of Appeals. There are parts of that opinion which adopt precisely the petitioners' contentions in the District Court and the Court of Appeals—for example, the holding that "under the decision of the Supreme Court, the District Judge had no alternative but to disapprove the plan since that Court had declared it illegal." Moreover, a considerable portion of the opinion deals with an important matter with which this Court did not deal at all, the dismissal of the § 77 proceedings.

The petitioners say (p. 2, italics in the original):

> "The directions now given by the Court of Appeals to the court below to proceed in accordance with its own opinion *and* this Court's earlier opinion would result in effectually circumventing this Court's opinion and mandate."

This complaint is wholly without substance. The petitioners imply that the Court of Appeals spoke first of its own opinion and second of this Court's opinion. The Court of Appeals spoke first of this Court's opinion and second of its own opinion. To the extent that the Court of Appeals undertook to interpret the mandate of this Court, it did only what was necessary and proper; there cannot be the slightest doubt that it considered the mandate of this Court

paramount. It intended to be, and was, faithfully obedient to the mandate of this Court in every respect.

Since the petitioners cannot possibly sustain the position that the Court of Appeals did not follow this Court's opinion of April 5, 1954 in what the Court of Appeals *did*, most of their brief is devoted to a discussion of what the Court of Appeals *said*. We discuss below (p. 46-75) the petitioners' complaints about what the Court of Appeals (or Judge HOLMES) said, complaints which are referred to in the petitioners' Questions II, IV and V (p. 3-4, 14-18, 19-20).

II.

The Court of Appeals was clearly right in reversing the District Court's dismissal of the § 77 proceedings.

The petitioners' contentions on this subject are frivolous.

The petitioners' Question III involves the Court of Appeals' reversal of the District Court's dismissal of the § 77 proceedings.

The petition quotes the provisions of subsections (e) and (g) of § 77 on which the petitioners rely (p. 4-5):

> "(e) * * * If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. * * *"
>
> "(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest

or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

In their Argument the petitioners say this, and only this (p. 19):

> "Subdivision (e) of Section 77 of the Interstate Commerce Act provides that if the District Judge shall not 'approve' the plan 'he shall enter an order in which he may either dismiss the proceedings, or in his discretion *and on motion of any party in interest* refer the proceedings back to the Commission for further action.' (Italics supplied.) Had 'any party in interest' made a 'motion' to refer the proceedings back to the ICC, the District Court would have been able to exercise its discretion as to whether or not that motion should be granted—or whether, in the alternative, he should 'dismiss the proceedings'. Without such a motion by a party in interest, however, there was no authority in law for the exercise of discretion. The District Court had no alternative but to dismiss.
>
> "Had Congress meant to give the District Court discretion to refer the case back to the Commission whether or not any party had so moved, Congress would have used language similar to that of Section 77(g), which provides that where there has been undue delay 'the judge, in his discretion, shall, on motion of any party in interest *or on his own motion*' dismiss the proceedings. In neighboring subdivision (e), which governs the District Court in this case, the words 'or on his own motion' do not appear."

This argument contains the clearest possible implication that the District Court did not undertake to exercise its discretion but dismissed the proceedings because no

party in interest made a motion for a reference back to the Commission. Nothing could be further from the fact. Counsel for the petitioners urged the District Court to dismiss in its discretion and the District Court said expressly that it was dismissing the proceedings in the exercise of its discretion. No suggestion was made by anyone—counsel or Court—until long after the entry of the Court's order of June 28, 1954, that the dismissal could be sustained because there was no motion for a reference back to the Commission.

Let us see what transpired in the District Court and in the Court of Appeals, so that there can be a clear grasp of the question which the petitioners present to the highest Court in the land.

On March 11, 1952, the District Court dismissed the § 77 proceedings on the ground of undue delay (I, 166-167, 169).

On January 19, 1953, the Court of Appeals reversed (II, 724-726; 201 F. 2d p. 328).

This Court's grant of certiorari on May 4, 1953, and its opinion of April 5, 1954 did not cover the Court of Appeals' reversal of the District Court's dismissal of the proceedings. 345 U. S. 948.

On May 26, 1954, immediately after the remand to the District Court, the Atlantic Coast Line moved in that Court for the approval of the Plan and in doing so summarized the new showing which it was prepared to make (VII, 24-33; see above, p. 2).

On June 19, 1954, the District Court issued a notice that a hearing would be held on June 21, 1954, on five matters, of which two were the following (VII, 40-41):

> "1. Under the Mandate of the Supreme Court of the United States filed herein on May 27, 1954, and Judgment of the Court of Appeals for the Fifth Circuit dated January 19, 1953, what courses are open to this Court to complete the reorganization of Florida East Coast Railway Company, and what

course do you consider most beneficial to the Debtor's estate and to the Creditors?

• • • • •

"5. Motion of Atlantic Coast Line Railroad Company, filed May 26, 1954, for entry of order confirming certain action of Court of Appeals, and approving Interstate Commerce Commission plan of reorganization dated October 25, 1951."

At the hearing on June 21, 1954 counsel for the petitioners was heard first and, after arguing that the Plan was "dead" (VII, 48-51), urged the Court to dismiss the proceedings *in its discretion* and *on the ground of unreasonable delay;* and counsel referred to the *Alternative Equity Plan as a particular reason* why the Court should dismiss the proceedings.[39] This argument was, of course, directed to

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[39] Among other things counsel said (VII, 51, 53):

"The Court, two years ago, found that there had been an unreasonable delay, and there has been more unreasonable delay up to date, and we cannot see how the Court could upset or override its former conclusions under present conditions. There is more reason today to say that there has been unreasonable delay than there was two years ago.

"The fact that the bondholders agreed on a reorganization plan which involved every subject of importance is a further reason to proceed with the foreclosure reorganization in accordance with that plan because they have disposed, by agreement, of many important questions, and that facilitates the action of the Court in proceeding to dismiss the bankruptcy or treat it as a dismissal.

• • • • •

"Now there is another feature and we hope that the Court will take that action. *If the Court writes an opinion it might embody in the opinion that finding that today, under present conditions there is an unreasonable delay in the reorganization, which, under Sections (g) and (e) of the law, authorizes the Court and gives it discretion to dismiss the bankruptcy.*

"Two years have gone by since you made the original order and if it was appropriate then in the Court's discretion to dismiss the bankruptcy and turn the property back to the Equity Suit it certainly is more so today, and we lack the benefit of the findings of increased reasons for saying there has been an unreasonable delay. That could be put in the opinion."

the first matter in the Court's notice of hearing, viz:

> "* * * what courses are open to this Court to complete the reorganization of Florida East Coast Railway Company, and what course do you consider most beneficial to the Debtor's estate and to the Creditors?"

Counsel for the Atlantic Coast Line was then heard. He started by saying that he "would like first of all to dispose of this idea of the dismissal of the proceeding and the return to Equity" (VII, 58). Because the arguments in favor of a dismissal had been based on claims of unreasonable delay, he quoted subsection (g), which specifically refers to delay, and then he made these points:

First: There was no power in the Court to dismiss the proceedings on the ground of undue delay, except "after consideration of the recommendation of the Interstate Commerce Commission" (VII, 58). No recommendation of the Commission had been obtained or requested.

Second: There had not been unreasonable delay (VII, 58-59).

Third: It would involve an abuse of discretion to dismiss the § 77 proceedings (VII, 59-60). In this connection counsel referred to the detailed discussion of this whole subject of a dismissal which had been included in a brief dated February 4, 1952, filed by the Atlantic Coast Line prior to the dismissal order of March 11, 1952, and counsel summarized some of the glaring faults of the Alternative Equity Plan which the petitioners were seeking to effect by dismissing the § 77 proceedings and going into equity.

As soon as counsel for the Atlantic Coast Line had concluded his argument, the following colloquy took place (VII, 64-65):

"The Court: I would like to hear what you have to say or what you think about the provision in the statute that the Court may dismiss, after considering the recommendation of the Interstate Commerce Commission. I would like to hear you on that as we go along. Section (f)[30] I believe it is. I would like to hear you on that as you go along.

"Mr. Mitchell: Well, I will speak of that first. *I am under the impression when you made the original order for dismissal, you did give consideration to the recommendation of the Commission. The recommendation of the Commission consisted in the plan, certified and approved.* The recommendation which you approved. Now you did that once and it seems to me that that complied with the statute, and I don't feel that it would be necessary to do that all over again, now, although you can pick up the old plan now, as far as we are concerned and consider what the recommendations were or are and rehabilitate the dismissal order on that basis."

After counsel for the petitioners had argued further, counsel for the Atlantic Coast Line replied (VII, 67):

"I just want to make it clear that I cannot go along with Mr. Mitchell's interpretation of subsection (g), the hearing after consideration of the recommendation of the Commission. He asserts that that was emobdied in the plan. *I think it is quite clear from the contents of the Act that it contemplates that the Court will ask the Commission for a recommendation and then consider it.*"

Shortly afterward counsel for the petitioners said (VII, 69):

"Now it is a question of considering the recommendation of the Commission before the Court dismisses. You can imagine the case where the Commission would delay, or not presenting any changes

[30] The Court meant subsection (g).

> and you would have no plan. No recommendation. And in that case it would in all probability be worded so you would have to call on the Commission to show cause why you shouldn't dismiss and get their recommendation on it. But that isn't the situation here. You have their recommendation and the plan. They worked on this thing over and over again and fired plan after plan at the Court and now they have made a recommendation and there it was. It was a question for the Court whether to accept the recommendation or dismiss it and that is what the Court did."

After the Atlantic Coast Line's introduction of evidence had been concluded, the Court distinctly indicated that there would be another hearing on the Atlantic Coast Line's motion.[31]

The Court next took up another matter, item 2 which had been noticed for hearing, the payment of interest on the First and Refunding Mortgage Bonds (VII, 40, 89-99).

Then, before taking up items 3 and 4 which had been noticed for hearing (VII, 40-41, 101-102), the Court inquired of counsel for the petitioners (VII, 100):

> "What effect do you think the consent of the Florida East Coast Railway Company has?"

Mr. Mitchell and counsel for the Atlantic Coast Line were then heard very briefly (VII, 100-101).

At the conclusion of the hearing on June 21, 1954, this was the situation:

> The Atlantic Coast Line's motion for approval of the Plan was pending undetermined.
>
> Counsel for the petitioners had argued in favor of a disapproval of the Plan by the Court and a dismissal of the proceedings under subsection (g) by the Court

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[31] The entire colloquy (VII, 87-88) is quoted in footnote 22 at page 27 above.

(1) *in its discretion,* (2) *on the ground of unreasonable delay and* (3) *on the theory that the Plan certified by the Commission in 1951 constituted a recommendation of the Commission for the purposes of subsection (g) in 1954.*

Counsel for the petitioners had also said that *the agreement on the Alternative Equity Plan was a further reason* to proceed with the foreclosure reorganization.

There had been only one passing reference to subsection (e) and that had been a statement by counsel for the petitioners that the Court could dismiss in its discretion under subsection (e) if there were undue delay (VII, 53; see above, p. 27, footnote 29).

There had been no contention that a dismissal would be mandatory under any circumstances.

It had been made perfectly clear that, if the Plan were not approved—and the Atlantic Coast Line's motion for approval had not been decided—the Atlantic Coast Line would wish a remand to the Commission, rather than a dismissal, and, as a party in interest, would make any motion which might be required.

On June 28, 1954, without any further hearing or notice of any kind, the Court handed down its opinion and order. In the opinion the Court said (VII, 129, italics supplied):[32]

> "More than two years ago this Court dismissed this bankruptcy proceedings *in the exercise of its discretion* under 77(e) and 77(g) of the Bankruptcy Act (11 U. S. C. A. 205); the latter subsection dealing with unreasonable delay in reorganization. The situation today is even more aggravated. More than two additional years have passed, without progress,

[32] The concluding paragraph of the Opinion reads (VII, 132, italics supplied):

> "For these and other reasons *the debtor railway should go back into equity receivership, so that the speedy plan of reorganization there available may be consummated by the 5% Bondholders,* who are the equitable owners of the property, and so that any person or persons desiring to buy the road shall be offered a fair opportunity to bid for it."

> and in the light of present conditions *the Court again finds,* with added reason, and *after having examined the recommendations of the Interstate Commerce Commission, that unreasonable delay has occurred. The plan for an internal reorganization agreed to by the holders of the 5% Refunding Bonds, and filed in the cause, opens the way for a speedy internal reorganization in the equity foreclosure case.*"

In the order the Court "adhered to and confirmed" its order of March 11, 1952, with two modifications which are immaterial for present purposes (VII, 133). The order of March 11, 1952, which was thus "adhered to and confirmed", expressly found that there was "undue delay in a reasonably expeditious reorganization of the debtor" and provided that "therefore, pursuant to the express provisions of Section 77" the reorganization proceedings were dismissed (I, 169). The "express provisions of Section 77" which refer to "undue delay in a reasonably expeditious reorganization of the debtor" are in subsection (g). Subsection (g) also contains the requirement for a recommendation of the Interstate Commerce Commission, which the Court's opinion implied had been met.

Three things are wholly clear:

The District Court accepted *in toto* the theories advanced on June 21, 1954 by counsel for the petitioners, viz., that it should dismiss the § 77 proceedings (1) *in its discretion,* (2) *on the ground of undue delay,* (3) *treating the Plan which the Commission had approved on October 25, 1951, as a recommendation under subsection (g) in 1954 with respect to the dismissal of the § 77 proceedings. The District Court also accepted counsel's argument that the Alternative Equity Plan "opens the way for a speedy internal reorganization in the equity foreclosure case".*

The petitioners' counsel have abandoned every one of the grounds on which the District Court was per-

suaded to act (see above, p. 37, footnote 22). Counsel's only contention now is that the District Court had no alternative but to dismiss under subsection (e) in the absence of a motion by a party in interest that the Plan be referred back to the Commission.

It would have been a gross abuse of the judicial process for the District Court to have dismissed the proceedings on June 28, 1954, under the circumstances which existed on that date, on the ground that the dismissal was mandatory because there had been no motion to refer the proceedings back to the Commission. The District Court did not do so.

There was manifestly no occasion for counsel for the Atlantic Coast Line to make a motion that the proceedings be referred back to the Commission. The Atlantic Coast Line's motion for approval of the Plan had not been acted upon prior to June 28, 1954, when the District Court handed down its opinion and order, and the District Court had definitely indicated that there would be another hearing.

Upon a disapproval of the Plan by the District Court only two possible courses were open: (1) a reference back to the Commission or (2) a dismissal of the § 77 proceedings. Counsel for the Atlantic Coast Line had made it perfectly clear that in the event of a disapproval of the Plan the Atlantic Coast Line wished a reference back to the Commission and definitely opposed a dismissal of the proceedings.

As we have said, the action of the District Court in dismissing the proceedings was not even remotely based on the lack of a motion by a party in interest for a reference back to the Commission. We are entitled to assume that the District Court would have repudiated any intent to act on any such hidden basis, a basis not brought out into the open by any counsel until long after the Court's order of June 28, 1954 had been entered.

The Atlantic Coast Line was, and is, unquestionably

a party in interest and, as such, entitled to make a motion for a reference back to the Commission.[33]

On the remand pursuant to the order of the Court of Appeals (if certiorari be denied), the Atlantic Coast Line will make the motion prescribed by subsection (e) and every requirement of that subsection, whether substantive or formal, for a reference back to the Commission will then have been met.

The long and short of the matter is that, at the instance of counsel for the petitioners, the District Court dismissed the § 77 proceedings in the exercise of its discretion, on the ground that there had been unreasonable delay and with the objective of putting through the Alternative Equity Plan, which is so plainly indefensible that counsel for the petitioners does not even mention it now (see above, p. 12-17).

* * * * *

The petitioners in Nos. 544 and 552 contend that the District Court exercised its discretion in dismissing the § 77 proceedings and that the Court of Appeals reviewed the District Court's exercise of discretion and erroneously concluded that the District Court had committed an abuse of discretion. We are answering those contentions in the briefs in reply to the two petitions.

The St. Joe Paper Company and its associated peti-

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[33] The Atlantic Coast Line has been admitted as a party in interest in the proceedings in the Court and those before the Interstate Commerce Commission.

It holds $1,900,000 principal amount of the unsecured claims against the Debtor (about 76% of that class of claims) and the Commission has valued the unmortgaged assets at $1,177,356 (VII, 112-115, Atlantic Coast Line Exhibit No. 7; 282 I. C. C. 176-181 at the beginning at Vol. I of the Record).

As a connecting trunk line the Atlantic Coast Line has *at least* the same interest in the reorganization of Florida East Coast Railway Company as Seaboard Air Line Railroad Company and Southern Railway System, which have been admitted as parties in interest in the Court and before the Commission.

In addition, of course, the Atlantic Coast Line Railroad Company would be the transferee of the Debtor's assets under the Plan.

tioners in No. 536 do not include any such contention in their Argument (p. 18-19), but in their Statement of the Case (p. 12-13) they argue briefly in favor of an equity receivership as against § 77 proceedings. We are referring to that Argument in our brief in No. 552. It is perhaps enough to say here that counsel for the petitioners in No. 536 undertake to dispose of all questions about the merits and demerits of § 77 reorganizations and equity reorganizations in a single paragraph (p. 12) which, among other things, contains the incorrect statement that under § 20a the "Commission is directed to hold public hearings with a view to protecting the interest of the public".[34]

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Apropos of the relative merits of § 77 proceedings and an equity receivership, the petitioners close their Statement of the Case by saying (p. 12-13):

> "With only one class of security holders now to be dealt with under the plan, a reorganization in equity promises to be much more expeditious than could any Section 77 reorganization of this Debtor."

It is not the fact that there is "only one class of security holders now to be dealt with under the plan". There are *at least* two: (1) the holders of the First and Refunding Mortgage Bonds and (2) the holders of the unsecured claims. Whether there is a third, the holders of the First Mortgage Bonds, depends upon the terms of the plan.

The balance of the sentence is predicated on the assumption that in the equity receivership the indefensible Alterna-

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[34] Section 20a(6) provides:

> "The commission *may* hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

Public hearings on a plan of reorganization under § 77 are mandatory.

tive Equity Plan would speedily be put into effect, at whatever injury to the public interest and the interests of the hundreds of holders of over $11,000,000 of Bonds.

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The effort to have this Court decide that the dismissal of the § 77 proceedings was mandatory is plainly frivolous.

III.

The petitioners' contention that "the Court of Appeals erred in holding that the worthless stock has acquired value" is a screened attack on this Court's decision of April 5, 1954 and constitutes an oblique and tardy attempt to obtain a rehearing with respect to that decision.

The argument that this Court referred in footnote 12 of the opinion of April 5, 1954 to "the 5% bondholders" is untenable. The Court clearly referred to the Debtor corporation, Florida East Coast Railway Company, and perforce to the stockholder who controls that Company.

The Court of Appeals' comment to the effect that the stock of the Florida East Coast Railway Company has "an artificial value" was a proper comment. Even if the comment had not been proper, it would afford no basis for a writ of certiorari, since the Court affirmed the District Court's disapproval of the Plan.

The petition places the greatest emphasis on the proposition that "the Court of Appeals erred in holding that the worthless stock has acquired value" (Question II, p. 3; 10-11; 14-18; 21-22).

The heart of the petitioners' complaint is that the Court of Appeals misinterpreted this Court's opinion of April 5, 1954 as requiring that a so-called "merger plan" be consented to and "initiated" by the "two existing corporate

entities"—that is to say, by the corporations and those who control the corporations as corporate entities. The petitioners' thesis, now advanced for the first time, is that this Court's opinion of April 5, 1954 required that any "merger plan" be "initiated" by "the 5% bondholders".

They do not explain how "the 5% bondholders" are supposed to "initiate" a "merger plan".

The Court of Appeals construed this Court's opinion as all others (with one exception) have construed it: as referring to the Debtor corporation, Florida East Coast Railway Company, and perforce to those who control the Company. Control, of course, is ultimately in the sole stockholder. So construing the opinion, the Court of Appeals said that the effect of the opinion was to give the stock an "artificial value" (VII, 382). This ws simply a comment, based on the generally understood effect of this Court's opinion of April 5, 1954. If the Court of Appeals' interpretation of the opinion was correct, the comment was clearly proper. If the Court of Appeals' interpretation of the opinion had been erroneous, the comment would have been a mistaken one but the burden would still be on the petitioners to show that they were adversely affected by the error. They do not even make any effort to show that they were, and it is clear that they were not, since the Court of Appeals reached the conclusion that under "the decision of the Supreme Court the District Judge had no alternative but to disapprove the plan since that court had declared it illegal" (VII, 388-389).

We will show that:

(1) The Court of Appeals' construction of this Court's opinion of April 5, 1954 was clearly correct;

(2) The Court of Appeals' comment was proper; and

(3) The petitioners' attack on the Court of Appeals' comments about the "value" of the stock is simply a screen for an attack on this Court's decision of April

5, 1954, in an oblique and tardy attempt to obtain a rehearing with respect to that decision.

(a) This Court's opinion of April 5, 1954 clearly related to the Debtor corporation, Florida East Coast Railway Company, and perforce to its sole stockholder, and not to "the 5% bondholders".

The text of this Court's opinion establishes, beyond the possibility of any doubt, that when the Court referred to "those who in the absence of § 77 would wield the corporate merger powers", it referred to the Debtor corporation and perforce to whoever controls the Debtor: in this instance its sole stockholder, the Trustee of the Mary Flagler Bingham Trust.[35] This has been the virtually universal interpretation of the opinion. Moreover, it was the petitioners' interpretation until the Court of Appeals handed down its decision reversing the dismissal of the § 77 proceedings; the petitioners have simply developed a new interpretation, in the hope of reaching this Court, because of their disappointment that the Court of Appeals did not sustain the District Court's dismissal of the § 77 proceedings.

(a)(1) The text of this Court's opinion of April 5, 1954 establishes, beyond the slightest possibility of doubt, that the Court referred to the Debtor corporation (and whoever controls it) and not to "the 5% bondholders".

In discussing this Court's opinion of April 5, 1954, the petitioners refer (p. 16) to two sentences in the body of the opinion (at pages 301 and 313-314) and to the second paragraph of footnote 12 (p. 309).

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[35] With respect to the ownership of the stock of Florida East Coast Railway Company, see the Atlantic Coast Line Railroad Company's conditional petition for a cross-writ of certiorari. It is unnecessary to consider at this point whether the Court also referred to the board of directors of the Debtor, as well as to the sole stockholder, since the board of directors would be elected by the sole stockholder.

At page 301, in giving the history of the case, the opinion says:

> "The matter was referred to an Examiner who, after a lengthy investigation, found that such a merger would not be in the public interest, and that the Atlantic plan would not constitute 'fair and equitable' treatment for all the unwilling bondholders *who were in substance the owners of the debtor railroad.*[1]"

> "[1] Examiner Jewell stated that under the plan previously approved by the Commission 'control would vest in the St. Joe Company by reason of its ownership of a majority in amount of the debtor's outstanding first and refunding mortgage bonds, these bonds being the only securities of the debtor exchangeable under the plan for the new securities of the reorganized debtor.' R., VI, p. 736. The only other outstanding bond issue of the debtor was, under that plan, to be paid off out of available cash. Previously the Commission had decided that the claims of unsecured creditors and the equity of the stockholders could not be recognized, and that these parties would therefore be denied participation in the reorganization. 252 I. C. C. 423, 465."

With respect to this statement at page 301, the petitioners say (p. 16):

> "This Court stated earlier in its opinion that the 5% bondholders are 'in substance *the owners of the debtor corporation*' (347 U. S. at page 301), just as the Commission had previously declared them the 'equitable owners'."

This single sentence contains two misstatements based upon a bad misquotation.

The words in the text of this Court's opinion are "in substance the owners of the *debtor railroad*". The words are not "in substance the owners of the *debtor corporation*", as the petitioners say. The words "debtor railroad" were undoubtedly used to mean the debtor corporation's lines of railroad and other railroad properties—that is, the physical railroad. The words "debtor corporation", of course, mean the corporate entity, Florida East Coast Rail-

way Company. This Court did not say, and it did not suggest that Examiner Jewell said, that the bondholders were in substance the owners of the corporate entity, Florida East Coast Railway Company. It is obvious that the bondholders have not been, and are not now, the owners of the corporate entity. Two of the principal points made in the second paragraph of footnote 12 (p. 309) are that the corporate entity, the Debtor, "remains a live and going concern", despite the pendency of the § 77 proceedings, and that it has a Board of Directors elected by its stockholders.

Furthermore, the reasonable construction of the sentence in this Court's opinion is that this Court was not even deciding that the bondholders were "in substance the owners of the debtor railroad". The Court was merely giving, in its narrative statement of the case, a very abbreviated summary of a statement in Examiner Jewell's proposed report (VI, 736).

The petitioners say that "the Commission had previously declared [the 5% bondholders] the 'equitable owners'." As this assertion immediately follows the reference to "the debtor corporation," it reads as if the Commission had declared "the 5% bondholders" the "equitable owners" of the "*debtor corporation*". The Commission's declaration was that the bondholders were the "equitable owners of *the assets mortgaged to secure the bonds*" (282 I. C. C. 186). That is a very different matter.

At page 302, in footnote 2, the opinion defines a "forced merger" as follows:

> "By 'forced merger' plan, or 'compulsory merger' plan, is meant a merger plan foisted upon one of the parties by the Commission, as distinguished from a merger voluntarily initiated *by the participating carriers.*"

At page 305 there are references to "mergers voluntarily initiated *by the participating carriers*" and to "mergers proposed *by the railroads* to be merged".

At pages 309-310 there are these crucial paragraphs:

> "All this of course is not to say that mergers cannot be carried out in the course of a § 77 reorganization. It merely means that if they are, they must be consummated in accordance with all the requirements and restrictions applicable to mergers under the Act primarily concerned with railroad amalgamations, the Interstate Commerce Act. So far as here revelant, that means that the merger must be worked out and put before the Commission *by the merging carriers.*[12] It also means that one carrier cannot be railroaded by the Commission into an undesired merger with another carrier.
>
> "In short, the consistency clause of § 77 incorporates by reference § 5 of the Interstate Commerce Act, as amended. And the very heart of § 5 is that a merger of two carriers may be approved by the Interstate Commerce Commission only if it originates as a voluntary proposal *by the merging carriers.* This essential prerequisite for a merger between Florida East Coast and Atlantic Coast Line—*two existing corporate entities*—must be complied with, for by virtue of the consistency clause the command of Congress applies even if one of these carriers is in § 77 proceedings just as much as it would if neither of the carriers were in receivership or trusteeship. The legislative incorporation of § 5 into § 77 should not result in its judicial mutilation."

This is the portion of the opinion which undertook to state this Court's decision explicitly. To avoid any possibility of misunderstanding of what was meant by the words *"the merging carriers"*, footnote 12 was added. It reads:

> "[12] We are not aware of any case other than the present where this requirement was not observed. In all the reported cases of reorganizations involving mergers, the merger was either proposed by the debtor in conjunction with the other party, or the merger involved a parent and its subsidiaries, and was treated essentially as an internal reorganiza-

tion. In any event, we are not now called upon to pass on the validity of the latter type of merger.

"In this connection it is important to remember that a railroad in § 77 proceedings is not a defunct organism but remains a live and going concern. See the references throughout § 77 to 'the debtor' as an active entity; also *Van Schaick* v. *McCarthy*, 116 F. 2d 987, 992-993. During the entire period that the Florida East Coast has been in receivership or trusteeship there have been annual stockholders' meetings at which a Board of Directors was elected. See the Florida East Coast's Annual Reports on file with the Interstate Commerce Commission. Indeed the desire to provide a ready remedy for the overhauling of a railroad's financial structure without impairing its primary responsibilities as a regularly functioning carrier was one of the principal reasons for the enactment of § 77. See 5 Collier, Bankruptcy, § 77.02. Thus it follows from the consistency clause, when viewed in the light of this corporate continuity of a railroad in reorganization, that those who in the absence of § 77 would wield the corporate merger powers must initiate and work out the merger now. Cf. § 77 (d), which not only permits but requires the debtor railroad itself to file a plan of reorganization ('the debtor . . . shall file a plan'; certain other interested parties 'may' also file a plan)."

If there could have been any doubt as to the meaning of the opinion, it would have been removed by the second paragraph of footnote 12. The first paragraph is less important, but the reference in the first paragraps to "*the debtor*" serves to emphasize that throughout the footnote the Court was speaking of the debtor corporation.

The first two sentences are to the effect that the "railroad"—and in this instance the word "railroad" was used to denote the debtor corporation—is "a live and going concern" and "an active entity". The word "entity" was undoubtedly used in the same sense as in the expres-

sion "two existing corporate entities" at page 310 (see the quotation at page 51 above). The footnote directs the reader to see "the references throughout § 77 to the 'debtor' as an active entity." Those references can be found in Appendix C to the petition in No. 544. All of the references are to the debtor corporation, which throughout § 77 proceedings is governed by its officers and directors and ultimately controlled by its stockholders, who elect the directors. The assets of a debtor are, of course, vested in a trustee or trustees, but the corporate entity is not vested in or owned by a trustee or trustees or by bondholders or other creditors.

The next sentence in the footnote says:

> "During the entire period that the Florida East Coast has been in receivership or trusteeship there have been *annual stockholders' meetings* at which a *Board of Directors was elected.* See the Florida East Coast's Annual Reports on file with the Interstate Commerce Commission."

It is manifestly impossible to reconcile this sentence with a contention that the Court was referring to "the 5% bondholders". *If the Court had been thinking of "the 5% bondholders", why would it have spoken of "annual stockholders' meetings" and a "Board of Directors"? To ascertain that during the period of the receivership and trusteeship there had been "annual stockholders' meetings" at which a "Board of Directors" was elected, this Court had to go outside of the record before it and inspect the Florida East Coast Railway Company's Annual Reports on file with the Interstate Commerce Commission.* The only conceivable explanation for this Court's action in ascertaining from the files of the Interstate Commerce Commission, and announcing that there had been "annual stockholders' meetings" at which a "Board of Directors" was elected, is that the Court recognized that,

if "the debtor" had any powers or duties with respect to a merger, a consolidation or a transfer of the debtor's assets, those powers would be exercised by the debtor's board of directors and/or by the debtor's stockholder or stockholders.

To support the next sentence, which refers to "a regularly functioning carrier", the Court cited 5 Collier, Bankruptcy, § 77.02. The most significant statement in § 77.02 is:

> "During the process of reorganization the section contemplates *the continued corporate existence of the debtor* under the control and supervision of the court."

For this proposition Collier cites *Van Schaick* v. *McCarthy*, 116 F. 2d 987, 992-993, which is cited in the second sentence of footnote 12.

Next in footnote 12 comes a sentence reading:

> "Thus it follows from the consistency clause, when viewed *in the light of this corporate continuity* of a railroad in reorganization, that *those who in the absence of § 77 would wield the corporate merger powers must initiate and work out the merger now.*"

When the petitioners quote from this sentence, they omit any reference to the words *"this corporate continuity"*. Yet the entire footnote is based on the concept of the continued corporate existence and vitality of a debtor despite the institution of § 77 proceedings. When the Court referred to "those who in the absence of § 77 would wield the corporate merger powers must initiate and work out the merger now," it had in mind this corporate continuity and it referred to those who would have had the power to "initiate" a "merger" if the Debtor had never become insolvent and the § 77 proceedings had never been instituted.

Footnote 12 closes with a sentence reading:

> "Cf. § 77(d), which not only permits but requires the debtor railroad itself to file a plan of reorganization ('the debtor . . . shall file a plan'; certain other interested parties 'may' also file a plan)."

Certainly, here the Court was referring to the Debtor corporation. Bondholders do not file a plan of reorganization on behalf of a debtor. If they constitute a sufficient percentage of a class of creditors, they can file for themselves. § 77 (d). Otherwise, they have no authority to file a plan at all.

As we show later, this last sentence was expanded by the words in parentheses, so as to make it more emphatic, after the opinion was issued (see below, p. 57). *Is it suggested for a moment that the Court thought that "the 5% bondholders" could file a plan on behalf of the Debtor?*

The petitioners say that they "see no basis for the assertion that *by a footnote* in its opinion this Court intended to vest in the worthless stock a dominating power, or any power, in connection with the reorganization" (p. 21). The implication is that the footnotes to this Court's opinion of April 5, 1954 are less important than the body of the text. That is certainly not the case. The crucial definition of a "forced merger" will be found in footnote 2 (p. 302). The effect of the 1935 amendment of Section 77, by which the so-called "consistency clause" was transferred from subsections (b) and (e) to subsection (f) (and its wording changed), was disposed of in the first paragraph of footnote 8 (p. 307); yet the question on which this Court granted certiorari explicitly stated that the only issue before the Court related to the effect of the 1935 amendment. 345 U. S. p. 949. Moreover, the first paragraph of footnote 8 contains the only reference to "the present merger provision" of the statute which the Court

construed in the April 5, 1954 opinion, although the reference is limited to a mention of "the bare words of the present merger provision". *The function of footnote 12 was to make the general language in the opinion indisputably explicit; for that reason footnote 12 has always been recognized as having a paramount importance.*

However, there is no warranty for the implication in the petition that this Court's references to the Debtor—and hence to its sole stockholder, who controls the Debtor—are limited to footnote 12. There are many references throughout the opinion to the Debtor corporation. The *only* reference to the bondholders on which the petitioners rely is the one which they misquote badly (see above, p. 49-50).

This is a suitable point at which to note the interpretation of this Court's opinion which was set forth in the dissenting opinion in this Court. For the three dissenting Justices, Mr. Justice DOUGLAS said (347 U. S. p. 328-330) that when the Court's opinion spoke of "those who in the absence of § 77 would wield the corporate merger powers" it meant "either the old management or the stockholders". On the basis of that interpretation they said, with italics for emphasis, that

> *"To allow the old management or the stockholders a veto power where Congress has provided they shall not vote is to indulge in as bold a piece of judicial legislation as one can find in the books."*

The effect of the petitioners' argument is that there was issued an opinion of the Court (concurred in by four Justices) and simultaneously a dissenting opinion (concurred in by three Justices) based upon a complete misinterpretation of the opinion of the Court.

There is further contemporaneous evidence of the

meaning of footnote 12. As originally issued the footnote did not read as it reads now. The second sentence of the first paragraph was changed as follows[36] (we have put a line through what was stricken and have underlined what was added):

> "In all the reported cases of reorganizations involving mergers, the merger was either proposed by the debtor in conjunction with the other party, or the merger involved a parent and its subsidiaries, ~~essentially an internal reorganization in that it is merely a recasting of a *de facto* single enterprise~~ and was treated essentially as an internal reorganization. In any event, we are not now called upon to pass on the validity of the latter type of merger."

Furthermore, an addition was made to the last sentence of the second paragraph:

> "• • • Cf. § 77 (d), which not only permits but requires the debtor railroad itself to file a plan of reorganization ('the debtor . . . shall file a plan'; certain other interested parties 'may' also file a plan)."

No other significant changes were made in the text of the opinion after it was issued. *The changes made in footnote 12 emphasize the importance of the footnote and the second change stresses the function of a debtor corporation,* which in § 77 proceedings is controlled by its stockholders. Is it possible that the changes would have been made if the Court had been thinking of "the 5% bondholders" in footnote 12?

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[36] The original text of footnote 12 will be found in the opinion as distributed to counsel shortly after April 5, 1954, in 22 U. S. L. Week 4193 (U. S. April 6, 1954) and in the Advance Sheets of the Lawyers' Edition, 98 L. Ed. p. 450.

The petitioners rely on the following sentence in the Court's opinion (347 U. S., p. 313-314):

> "The kind of Hobson's choice, more or less, to which security holders are put when voting on a merger plan is not to be put to them on a plan initiated by the Commission rather than by their own corporation."

The petitioners quote only part of the sentence (p. 16). They suggest that when the Court used the words "their own corporation" it meant "the bondholders' own corporation". The Court did not say that. It said that the security holders had a right to have a plan initiated "by their own corporation". The plan must be initiated *by the corporation*—the corporate debtor, in this instance Florida East Coast Railway Company. The Court did not suggest, even remotely, that by some novel procedure bondholders could initiate a plan on behalf of a debtor corporation. The sense of what the Court said was very different: that the debtor corporation itself should initiate the plan. When the Court called the Debtor "their own corporation", it spoke of the Debtor as compared with, or contrasted with, the Commission.

The thought suggested in the reference to "Hobson's choice, more or less" is that the bondholders and other creditors have a right to have Florida East Coast Railway Company rather than the Commission "initiate" the "merger plan". This presupposes either that it would (or might) be advantageous to them to have the plan initiated by the Debtor or that they have a statutory right to insist on that procedure whether it is advantageous to them or not. The petitioners' counsel question the correctness of the thought reflected in the sentence. However, the question now under consideration is what the Court said, not whether the criticisms made by the petitioners' counsel are sound.

A consideration of the background of the decision of April 5, 1954 confirms that in footnote 12 the Court was referring to the Debtor, the corporate entity, and not to "the 5% bondholders". The commonest conflicts in § 77 proceedings have been between the debtors (representing stockholders) on one side and bondholders on the other side. In all of the cases decided by this Court which related to plans of reorganization the respective debtors have been parties and have been opposed by bondholders.[37] The same thing is true of many applications for certiorari denied by this Court.[38]

One of the sharpest conflicts took place as recently as in 1952 in *Missouri Pacific Railroad Co.* v. *Group of Institutional Investors*, 343 U. S. 929, 982-987. The Missouri Pacific Railroad Company, the Debtor, applied for a writ of certiorari to review a decision of the Court of Appeals of the Eighth Circuit, approving a plan of reorganization for the Missouri Pacific Railroad Company and certain of its subsidiaries under which there was to be a "consolidation" of various corporations. *Missouri Pac. R. Co.* v. *Group of Institutional Investors* (1951) 191 F. 2d 265. Four other petitions for certiorari were also filed. The Group of Institutional Investors, a bondholders group, opposed

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[37] *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523; *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495; *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.* (1947) 329 U. S. 607.

[38] *St. Louis-San Francisco Railway Co.* v. *Chase National Bank et al., Trustees* (1946) 328 U. S. 868; *Chicago, Rock Island & Pacific Railway Co.* v. *Fleming* (1946) 329 U. S. 780; *St. Louis Southwestern Railway Co.* v. *Henwood, Trustee* (1947) 330 U. S. 836; *Chicago, Rock Island & Pacific Railway Co.* v. *Metropolitan Life Insurance Co. and other applications* (1947) 332 U. S. 793; *Missouri Pacific Railroad Co.* v. *Group of Institutional Investors* (1952) 343 U. S. 929 (a memorandum of Mr. Justice FRANKFURTER is at 343 U. S. 982-987).

the petitions. All were denied, with Mr. Justice BLACK and Mr. Justice FRANKFURTER dissenting. 343 U. S. 929. Mr. Justice FRANKFURTER wrote a separate memorandum, in which he reiterated views previously expressed in a similar memorandum in *Bondholders, Inc.* v. *Powell* (1952) 342 U. S. 921-926, and in which, among other things, he questioned the Commission's ruling that the common stock of the Missouri Pacific Railroad Company was without value. 343 U. S. 982, 986-987. This memorandum was only an incident—although a recent and important one—in a long series of related conflicts between debtors and bondholders in § 77 proceedings before this Court. In the light of this background, it is impossible to take seriously a suggestion that when footnote 12 referred to "the debtor" it did not mean "the debtor" but meant a group of bondholders.

In support of the contention that this Court was referring to "the 5% bondholders" the petitioners say (p. 16-17):

> "Under any fair and equitable reorganization plan, these bondholders are entitled to control the debtor railroad or the reorganized corporation; and, *a fortiori*, 'in the absence of § 77' such 5% bondholder control would have been perfected years ago, from foreclosure or other enforcement of creditors' rights. Accordingly, it follows that in this case the 5% bondholders are those who are entitled to wield the corporate merger powers."

The first of these sentences sets forth two astounding propositions. The second states the conclusion that the petitioners would draw from them.

The first proposition is that "under any fair and equitable reorganization plan, these bondholders are entitled to control the debtor railroad or the reorganized corporation * * *". With this calm categorical assertion counsel would sweep away (1) the requirement of § 77(d) that

"the Commission approve a plan of reorganization which it finds to be compatible with the public interest", (2) what this Court said in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448, 468, about the importance of the public interest and the leadership of the Commission, (3) what this Court said in *Ecker* v. *Western Pacific Railroad Corp.* at page 471 about the importance to the public of proper control of a reorganized company, and (4) the Commission's explicit findings, referred to in Justice DOUGLAS' dissenting opinion, that control by the St. Joe Paper Company of a reorganized railroad company would be "contrary to the public interest". 347 U. S. p. 325-326; 282 I. C. C. p. 187-188. When the petitioners speak of "these bondholders" or the "5% bondholders" they mean the St. Joe Paper Company, which owns a majority in amount of the 5% Bonds, and the duPont Trustees, who hold additional Bonds and control the St. Joe Paper Company (see above, p. 14). When the petitioners speak of "any fair and equitable reorganization plan" they mean a plan like the Alternative Equity Plan which would result in St. Joe Paper Company control (see above, p. 12-17).

The second proposition is that " 'in the absence of § 77' such 5% bondholder control would have been perfected years ago, from foreclosure or other enforcement of creditors' rights". There is no basis for this pronouncement. Nine and one-half years of equity receivership, from August 31, 1931 to January 25, 1941, did not result in a reorganization and on January 25, 1941 the § 77 proceedings were instituted in the hope of effecting a reorganization. There is no warrant for saying that, if the transfer to the § 77 proceedings had not been made, there would have been a reorganization. Furthermore, in order to carry out a reorganization by a foreclosure in equity, it would be necessary to file an application under § 5 of the Interstate Commerce Act, and on such an application the Commission would have the same powers and responsi-

bilities with respect to control as it has under § 77 proceedings.[39]

(a)(2) *The Court's opinion of April 5, 1954 has been generally interpreted as referring to the Debtor corporation (and those who control it) and not to "the 5% bondholders".*

On April 19, 1954 the Atlantic Coast Line Railroad Company filed a petition for a rehearing with respect to this Court's decision of April 5, 1954. That petition made it entirely clear that counsel for the Atlantic Coast Line Railroad Company interpreted the Court's opinion of April 5, 1954 as referring to the Debtor corporation and perforce to its sole stockholder. The petition was denied. 347 U. S. 980. The petitioners now contend that the denial of the petition amounted, in effect, to a ruling by this Court that counsel for the Atlantic Coast Line had misinterpreted the decision and particularly footnote 12 (p. 15-16). That is one of the most extraordinary propositions ever advanced in this extraordinary case. Certainly this Court, at every term, denies a great many petitions for rehearings which correctly interpret the Court's opinions.

On May 3, 1954, former Senator Burton K. Wheeler, as attorney for Missouri Pacific Railroad Company, Debtor, in proceedings before the Interstate Commerce Commission in *Missouri Pacific Railroad Company Reorganization,* Finance Docket No. 9918, filed exceptions to

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[39] We made this point at the District Court hearing of June 21, 1954 (VII, 59). We had previously made it in much greater detail in a brief, dated February 4, 1952, which we filed in the District Court and to which we referred at the hearing of June 21, 1954 (VII, 59). In the brief of February 4, 1952, a copy of which was filed with the Court of Appeals as an Appendix to the appellant's brief on the 1952 appeal, we discussed the pertinent provisions of § 5(2) of the Interstate Commerce Act and the authorities relating thereto (p. 14-16).

Counsel for the petitioners tried unsuccessfully to brush all this aside (VII, 65-66).

a proposed report of Examiners Boyden and Kirby of the Interstate Commerce Commission, recommending a plan for the Missouri Pacific. Senator Wheeler said (p. 3):

> "The recent decision of the Supreme Court in *St. Joe Paper Co., et al.* v. *The Atlantic Coast Line,* [Florida East Coast reorganization] makes it plain that only a merger initiated by the Debtor may be approved by the Commission."

This Court's opinion of April 5, 1954, accords to Senator Wheeler a special standing, for he is referred to in the opinion as "the guiding spirit for most of the legislation here under consideration" (347 U. S. p. 310).

On June 21, 1954 the hearing was held in the District Court which resulted in the order of June 28, 1954. At that hearing counsel on both sides treated the Court's decision of April 5, 1954 as referring to the Debtor and its sole stockholder and not to "the 5% bondholders". Counsel for the petitioners said (VII, 55):

> "• • • I want to say that I think the proposal to prove that on April 13th, 1954, the Florida East Coast Railroad Company adopted the Commission plan, is quite irrelevant. [*Mr. Justice Frankfurter*] *said the plan is faulty because it was not initiated by the carrier and nobody can effectuate it.* The bondholders or security-holders or anybody else. That's the effect of his decision."

When the Atlantic Coast Line commenced the introduction of its evidence, counsel for the petitioners made a rather extensive objection to the evidence but never suggested that the evidence was immaterial because the Supreme Court had thought that consent of, or initiation on the part of, "the 5% bondholders" was required (VII, 70-71). Furthermore, on cross-examination counsel for the petitioners suggested that the Atlantic Coast Line's showing was inadequate because it did not include "any corpo-

rate records of the Florida East Coast Railway showing any action by the directors, or anything of that kind" (VII, 83).

Judge STRUM's opinion of June 28, 1954 followed the argument of counsel for the petitioners closely (VII, 127-131).

The petitioners quote most of a paragraph of Judge STRUM's opinion in which he said (p. 14-15; VII, 131):

> "I am loath to believe that any action taken by the holders of this worthless stock would be of any significance."

The petitioners also mention the District Court's order of January 31, 1941, which "relieved the Debtor from any duty under Section 77 to file any plan of reorganization" (p. 17); the order of January 31, 1941 was also mentioned by Judge STRUM (VII, 132).

Judge STRUM was indeed "loath to believe that any action taken by the holders of this worthless stock would be of any significance". But he construed this Court's decision exactly as counsel for the petitioners asked him to construe it, viz, that "a merger plan submitted by the Interstate Commerce Commission must not only have the consent of the carriers affected, but must be *initiated* by them" (VII, 130, italics in original). And when he said "carriers" he unquestionably meant the Florida East Coast Railway Company, not "the 5% bondholders". In short, his idea was that (1) initiation by "the carriers affected" was essential to the validity of any "merger plan", (2) any such consent was, in effect, unobtainable from Florida East Coast Railway Company because action by the holders of its worthless stock should not have any significance and (3) consequently there could never be a "merger plan" involving the Florida East Coast Railway Company. But he did not treat this Court's opinion as referring to "the 5% bondholders".

As to the District Court's order of January 31, 1941, this is a suitable point at which to note that that order

relieved the Debtor from any *duty* under Section 77 to file any plan of reorganization but it did not deprive the Debtor of the *right* to file a plan if it chose to do so (VII, p. 6-7). What the Court of Appeals later said about the order is indisputably correct (VII, 388):

> "The trial judge said in his opinion of June 28, 1954, that he was loath to believe that any action taken by the holders of this worthless stock would be of any significance; that the effect of the reorganization proceedings was to eliminate the Florida East Coast Railway Company and its stockholders, at their request, as factors in the preparation or adoption of any reorganization plan. This statement went beyond the terms of the order itself, which relieved the debtor from any duty to file a plan but did not undertake to disqualify the debtor from consenting to a plan or even initiating one; *it dealt with what the debtor was under duty to do, not with what it might do.*"

On the appeal to the Court of Appeals the Atlantic Coast Line, the appellant, said in its brief that the words "those who in the absence of § 77 would wield the corporate merger powers" referred to "either the old management or the stockholders", as Mr. Justice DOUGLAS had said (p. 44). None of the three briefs filed on behalf of the appellees, by the same counsel who now represent the petitioners in Nos. 536, 544 and 552, questioned this. And the appeal was argued on that basis.

Judges HOLMES and BORAH took it to be established that that was the meaning of this Court's opinion (VII, 380-392). Judge RUSSELL suggested that this Court's opinion could be construed as applying to the bondholders (VII, 392-394). He did not refer to anything in the opinion as supporting that construction. As already stated, none of the counsel in the case had advanced that construction in any brief or on the oral argument in the Court of Appeals. The basic premise on which the case was presented in the Court of Appeals was that footnote 12 means what it says.

(a)(3) The appellees' new and untenable interpretation of this Court's opinion of April 5, 1954 is a result of their disappointment with the Court of Appeals' reversal of the District Court's dismissal of the § 77 proceedings.

It is not difficult to understand why the petitioners have changed their interpretation of this Court's decision of April 5, 1954, particularly footnote 12, and now contend that the Court referred to "the 5% bondholders".

Their objective is to defeat *any* plan providing for a unification of the Florida East Coast with the Atlantic Coast Line, no matter how favorable such a plan may be to the bondholders of the Florida East Coast as a class, and to put through the Alternative Equity Plan (see above, p. 12-17). When this Court's decision of April 5, 1954 was handed down, they doubtless expected that on the remand Judge STRUM, who had dismissed the § 77 proceedings in 1952, would do so again; and that expectation proved to be justified.

They evidently hoped also that the Court of Appeals would either dismiss any appeal or affirm the dismissal of the § 77 proceedings. The Court of Appeals did not do so.

The petitioners do not like the prospect of having the proceedings referred back to the Commission, which has made several findings that stand in the way of the Alternative Equity Plan or any plan having similar effects (see above, p. 12-17). Their disappointment has led them to advance a construction of this Court's opinion of April 5, 1954 which is radically different from—indeed, almost the antithesis of—the construction which they adopted in the District Court. And they criticize the Court of Appeals for making comments in its *per curiam* opinion based upon the construction of this Court's opinion which was adopted in the Court of Appeals by both sides.

At the same time the petitioners have allowed themselves to strike out wildly and unjustifiably at Mr. Kenan, the sole Trustee of the Mary Flagler Bingham Trust, and

as such, the sole stockholder of Florida East Coast Railway Company.

In Question II, the petitioners say (p. 3):

> "It is clear from the record that the Atlantic Coast Line now is attempting to use the Debtor's sole shareholder as its cats-paw."

A cats-paw is a tool or a dupe. This derogatory characterization of Mr. Kenan is evidently attributable solely to the fact that Mr. Kenan has not used his position as the sole stockholder of Florida East Coast Railway Company (in his capacity as Trustee) in such a way as to block the kind of reorganization which as long ago as November 3, 1944, he decided would be in the best interests of his Trust (VII, 110-111; Atlantic Coast Line Exhibit No. 6).

What the Court of Appeals said about the "value" of the stock of the Debtor consisted merely of comments which were entirely proper. The Court of Appeals made no "holding".

Even if the comments had not been proper, they would afford no basis for a writ of certiorari, since the Court affirmed the District Court's disapproval of the Plan.

The longest single section (p. 14-18) in the petition is entitled:

> "The Court of Appeals Erred in Holding that the Worthless Stock Has Acquired Value".

And there are several references in the statement of the case of the same general tenor (p. 8, 10-11). The curious notion is advanced that what the Court of Appeals had to say about the "value" of the stock of the Florida East Coast Railway Company was based upon a "contention made from the witness stand by the president of the Atlantic Coast Line" (p. 10).

The unquestionable effect of this Court's decision of

April 5, 1954 was to vest in the sole stockholder of Florida East Coast Railway Company the power to block a "merger plan". Cross-examined by Judge STRUM at the hearing of June 21, 1954, the President of Atlantic Coast Line gave the testimony referred to in the petition at page 8 (VII, 85). And the *per curiam* opinion of the Court of Appeals suggests that as a result of this Court's opinion the stock now has a "value" of "an unreal quality"—an "artificial value" (VII, 382).

The petitioners' statement (p. 10) that the Court of Appeals adopted "the contention made from the witness stand by the president of the Atlantic Coast Line that this Court's opinion of April 5, 1954 in some fashion created a previously non-existent value for the Debtor's stock" bears no relation to what actually happened. The President of the Atlantic Coast Line merely answered questions put to him by the District Court (VII, 85) and, so far as we recall, what he said in answer to the Court's questions about the "value" of the Debtor's stock was never even called to the attention of the Court of Appeals.

The Court of Appeals did not *hold* that the stock had "value". It merely commented that that was a result of this Court's decision.

"Value is a word of many meanings". BRANDEIS, J., concurring in *Southwestern Bell Telephone Company* v. *Public Service Commission* (1923) 262 U. S. 276, 310; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523, 540. Certainly the effect of this Court's decision of April 5, 1954 was to give the stock a kind of "value".

However, even if the comments made by the Court of Appeals had not been proper they would afford no basis for a writ of certiorari. The Court of Appeals made two decisions (VII, 388-389):

> "Under the decision of the Supreme Court the District Judge had no alternative but to disapprove

> the plan since that court had declared it illegal. However, he erred in dismissing the Section 77 proceeding and returning the affairs of the debtor to the equity receivers."

The petitioners utterly fail to show any relationship between the Court of Appeals' comments about "value" and either of its decisions.

The petitioners are making a screened attack on this Court's decision of April 5, 1954 in an oblique and tardy attempt to obtain a rehearing.

The key paragraph in the petition will be found in the Conclusion (p. 22):

> "This Court should take back the case, to clarify the situation. The three opinions filed in the Court below are no adequate chart for the future. It is futile to proceed with the reorganization without knowing who is entitled to speak for the Debtor. Without an authoritative decision by this Court, the result will be confusion, conflicting plans and a further fruitless expenditure of time and effort. Justice and good sense require that the parties now be given the essential guidance."

The Conclusion contains six paragraphs, of which the first five all relate to the interpretation of footnote 12 of the Opinion of April 5, 1954, and the sixth presents the proposition that the case should have gone direct from the District Court to this Court "if the District Court's action was to be reviewed."

The complaint that "the three opinions filed in the court below are no adequate chart for the future" is disingenuous. The statement that "there has been no authoritative decision by this Court" and the request for "the essential guidance" gives a clearer indication of the petitioners' real complaint. It is that the decision of April 5, 1954 has not served to block a "merger plan"

and to enable the petitioners to put through the Alternative Equity Plan (see above, p. 12-17). They therefore would like to consider the April 5, 1954, decision as not "authoritative" and to obtain a reconsideration of the decision in the guise of the clarification of the April 5, 1954 opinion.

Counsel for the petitioners insist that Florida East Coast Railway Company and its sole stockholder should not have the power to "initiate" a plan (p. 14-18, 21-22). They say (p. 21):

> "At the present time, it is being asserted that not only has the same stockholder regained his position but that he has acquired a power *to propose* turning over the property of the 5% bondholders lock, stock and barrel to the Atlantic Coast Line, which long has coveted this prize."

As Justice DOUGLAS said in his dissenting opinion (347 U. S. p. 329), "The proposal of a plan expresses merely the wish." There is no reason why the holder of all of the stock of Florida East Coast Railway Company should not be permitted *to propose* any plan authorized by § 77. The petitioners are simply disappointed because it now appears that the sole stockholder of Florida East Coast Railway Company is quite willing to "propose" a "merger plan" and that consequently the decision of April 5, 1954 does not constitute the bar to a "merger plan" which the petitioners thought that it did (see above, p. 66-67).

The portions of the petition to which we have just referred (p. 14-18, 21-22) constitute a thinly veiled attack on the decision of April 5, 1954. It is not the respondent's responsibility to defend that decision. The respondent petitioned for a rehearing; the present petitioners stood silent; and the petition was denied. The petitioners' present petition for a writ of certiorari is, in effect, a petition for a rehearing presented months too late, because the decision of April 5, 1954 has not served the petitioners' purposes.

IV.

The petitioners' contention that this Court's reversal of the 1953 judgment of the Court of Appeals reversed that Court's decision *in toto* is untenable.

The petitioners' Question IV reads as follows (p. 3-4):

> "IV. After this Court had ruled that the plan considered by it was defective and for that reason had reversed an earlier Court of Appeals decision which had directed that the plan be 'approved', the question is presented whether the Court of Appeals may now say that its previous decision has not been overthrown, made void, undone or annulled; and whether one of its Judges may maintain in his concurring opinion that the earlier holding 'that the plan was a good one' remains as 'the law of the case' and that 'The Supreme Court did not find anything wrong with the plan itself'."

The petitioners argue that this Court's reversal of the 1953 decision of the Court of Appeals reversed that decision *in toto* (p. 19-20).

The Court of Appeals' reversal on January 19, 1953 of the District Court's order of March 11, 1952 involved (1) a reversal of the District Court's finding "that the Plan was neither fair nor equitable and did not afford due recognition of the rights of the 5% bondholders, particularly the minority group", (2) a reversal of the District Court's finding "that there had been an unnecessary delay in a reasonably expeditious reorganization of the Debtor" and (3) a reversal of the District Court's "decision to dismiss the bankruptcy proceeding and turn the Debtor's property over to the equity receiver" (VII, 380; *In re Florida East Coast Railway Co.*, 201 F. 2d 325).

This Court's grant of certiorari was limited to a single question, whether the Interstate Commerce Commission has "a power to force mergers". 345 U. S. 948-949.

This Court reversed the judgment of the Court of Appeals and the case was remanded to the District Court for further proceedings in accordance with the opinion of this Court (VII, 23; 347 U. S. p. 315).

The *per curiam* opinion of the Court of Appeals, correctly recited all this (VII, 380-381). The petitioners make the following complaint (p. 12):

> "[Judge HOLMES] has also ruled that this Court's decision of April 5, 1954 'was not on the merits of the plan itself except insofar as it related to a forced merger' and that 'except as to the merger provisions' the previous holding of the Court of Appeals *en banc* (which this Court had reversed) 'that the plan was a good one' is still the 'law of this case' (Appendix II, p. 44). The same view is indicated in the *per curiam* opinion (see Appendix II, p. 33), where the Court of Appeals suggests that substantially all of its earlier decision stands untouched notwithstanding the reversal by this Court."

The view expressed by Judge HOLMES and in the *per curiam* opinion is clearly correct. Whenever an order or judgment is *affirmed* the effect is, of course, to affirm each and every part of it. That is not true of a *reversal.* A reversal of a judgment or order does not necessarily reverse each and every part of the decision affected; in determining the effect of a reversal, the proper course is to ascertain what the court undertook to consider and decide and what it did decide.[40] This Court's decision

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[40] *Gaines* v. *Rugg* (1893) 148 U. S. 228, 238, 240; *Mutual Life Insurance Company* v. *Hill* (1904) 193 U. S. 551, 553; *Wolff Packing Co.* v. *Court of Industrial Relations* (1928) 267 U. S. 552, 562; *Des Moines Terminal Co.* v. *Des Moines Union Ry. Co.* (C. C. A. 8, 1931) 52 F. 2d 616, 629-630; cert. den. 285 U. S. 537; *New York Life Ins. Co.* v. *Gamer* (C. C. A. 9, 1939) 106 F. 2d 375; cert. den. 308 U. S. 621; *Hansen & Rowland, Inc.* v. *C. F. Lytle Co., Inc.* (C. C. A. 9, 1948) 167 F. 2d 998, 999; *United States* v. *Southern Pac. Co.* (D. C. Utah, 1923) 290 Fed. 443.

in *Gaines* v. *Rugg* (1893) 148 U. S. 228, 238, 240, is particularly clear on this point.[41]

The petitioner's contention that the Court of Appeals' 1953 decision was "overthrown, made void, undone or annulled" completely disregards the fact that this Court's grant of certiorari was limited to a single question, whether the Interstate Commerce Commission has "a power to force mergers". The petitioners would give the same effect to this Court's decision as if the grant of certiorari had been unlimited, as if this Court had reviewed all questions which were before the Court of Appeals, and as if this Court had found the Court of Appeals was wrong on every point.

The petitioners complain because counsel for the Atlantic Coast Line referred to the Plan as "a good plan", although this Court had found the Plan to be "defective and invalid" (p. 8). On January 19, 1953 the Court of Appeals found the Plan to be "a good plan" in every respect which involved the attributes of the Plan: its fairness and its compatibility with the public interest (see above, p. 20-21). This Court found the Plan to be "defective and invalid" because there was no showing before this Court that it was initiated by the Debtor, Florida

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[41] *Gaines* v. *Rugg* involved issues as to (1) the title and possession of certain lands and (2) an accounting with respect to the occupancy of the lands. The Supreme Court's holding and the effect of the use of the word "reversed" appear from the following passage in the Court's opinion, at page 238:

> "Because this court was dissatified with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the Circuit Court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. It did not disturb the findings and decrees of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects."

East Coast Railway Company. Thus any defect in the Plan related to its origination, its paternity—or, to be more precise, the record of its paternity—not to its qualifications as "a good plan".

Of course, if the Court of Appeals' judgment of November 5, 1954 stands, the Court of Appeals' decision of January 19, 1953 will not bar the petitioners from showing (1) that that decision does not apply to a different plan or (2) that because of changed conditions some portion or portions of the decision are no longer applicable. But the petitioners cannot erase the record that the decision of January 19, 1953, was a decision of the Court of Appeals, sitting *en banc,* reached after considering voluminous briefs and hearing a specially set all-day argument. Even if the Court's decision were not "the law of the case", it would be an historical fact of compelling significance.

V.

There is no basis for any complaint about the statements made by Judge Holmes which are referred to in the Petitioners' Question V.

The petitioners make this complaint (p. 20):

> "[Judge Holmes] also declared in the face of this Court's ruling to the contrary, that only *after* 'approval' and even 'confirmation' of the plan is it necessary to get the consent of the security holders to the proposed merger. This Court had clearly ruled that such a 'Hobson's choice' should *not* be put to the security holders. In both respects, the Circuit Judge is undertaking to overrule this Court's April 5 opinion."

The petitioners' Question V relates to this subject (p. 4).

Judge Holmes did not undertake to "overrule this Court's April 5, 1954 opinion." He simply recited the

explicit provisions of § 77(d) of the Bankruptcy Act, of Section 5(2) of the Interstate Commerce Act and of the consistency clause of § 77(f) and pointed out that "the 1935 revision of Section 77 did more than change the location of the consistency clause; it added the words *'Upon confirmation of the plan',*". See Appendix A.

CONCLUSION.

The petition for certiorari should be denied.

February 2, 1955

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APPENDIX A

The Statements in Judge Holmes' Concurring Opinion Referred to in the Petitioner's Question V.

The first paragraph of Section 77(d) provides explicitly that the Commission "shall approve a plan, *which may be different from any which has been proposed.*" The authority of the Commission to modify any plan, and to "initiate" a plan to that extent, is specific.

Section 5(2)(b) of the Interstate Commerce Act provides, with respect to unifications to which that Section applies:

> "If the Commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable,* the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *."

As we showed at pages ii-iii of Appendix A to our petition for rehearing in this Court, dated April 9, 1954 (October Term, 1953, No. 24), this provision has been applied in a manner consistent with its evident intent—that is to say, the Commission has on many occasions prescribed modifications of "merger plans" submitted to it under Section 5 and taken the "initiative" to that extent.

The so-called consistency clause of subsection (f) of §77 provides:

> "*Upon confirmation of a plan,* the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the

> Interstate Commerce Act as now or hereafter amended."

This Court's opinion April 5, 1954 says (347 U. S. p. 305):

> "From the initial enactment in the Transportation Act of 1920, 41 Stat. 456, 480, to the most recent comprehensive re-examination of these provisions in the Transportation Act of 1940, 54 Stat. 898, 905, Congress has consistently and insistently *denied the Interstate Commerce Commission the power to take the initiative* in getting one railroad to turn over its properties to another railroad in return for assorted securities of the latter. *The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.*"

The first paragraph of footnote 8 reads (347 U. S. p. 298):

> "In the course of the 1935 revision of § 77, the consistency clause was taken out of subsection (b)(3), combined with a similar clause in subsection (e), and, as thus combined, placed in subsection (f) of the statute, 49 Stat. 911, 920. Judge SIBLEY indicated that he thought the consistency clause 'became accidentally misplaced in redrafting the Act.' 81 F. Supp. at 932. However that may be, it seems quite clear that Congress did not intend to alter the deliberately established relationship between § 5 of the Commerce Act and § 77 (b)(3) of the Bankruptcy Act merely by a change in the position of the consistency clause, unaccompanied by any explanatory comment. It would be a gross disregard of the meaning of legislation to be controlled by the bare words of the present merger provision detached from, and in defiance of, the whole history of the section."

This Court's opinion does not quote the provisions of § 77(d), of § 5(2)(b) of the Interstate Commerce Act or of the consistency clause of § 77(f).

With respect to the foregoing matters, Judge HOLMES, concurring in the Court of Appeals, said (VII, 390):

> "Section 77 (d) of the Bankruptcy Act explicitly provides that a reorganization 'may be different from any plan which has been proposed.' Section 5(2) of the Interstate Commerce Act expressly provides that when a plan for a unification is submitted to the Commission, the latter may prescribe 'such terms and conditions and such modifications as it shall find to be just and reasonable' and that it may approve the plan 'upon the terms and conditions, and with the modifications so found to be just and reasonable.' Both statutes clearly contemplate that the Commission may modify unification plans which are submitted to it. Since both statutes authorize the Commission to modify the terms of a proposed merger, and any required consent to a plan that has been modified by the Commission must come after the modification, there is no basis for the suggestion that there must be a consent to any modification in advance of the time when it is made by the Commission. Moreover, the consistency clause of Section 77(f) provides that, upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of any securities, assumptions of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, to the extent contemplated by the plan. It thus expressly contemplates that any proceedings under Section 5 of the Interstate Commerce Act shall take place after confirmation of the plan. The 1935 revision of Section 77 did more than change the location of the consistency clause; it added the words 'upon confirmation of the plan,' which are highly pertinent in determining when any action required by the consistency clause must be taken."